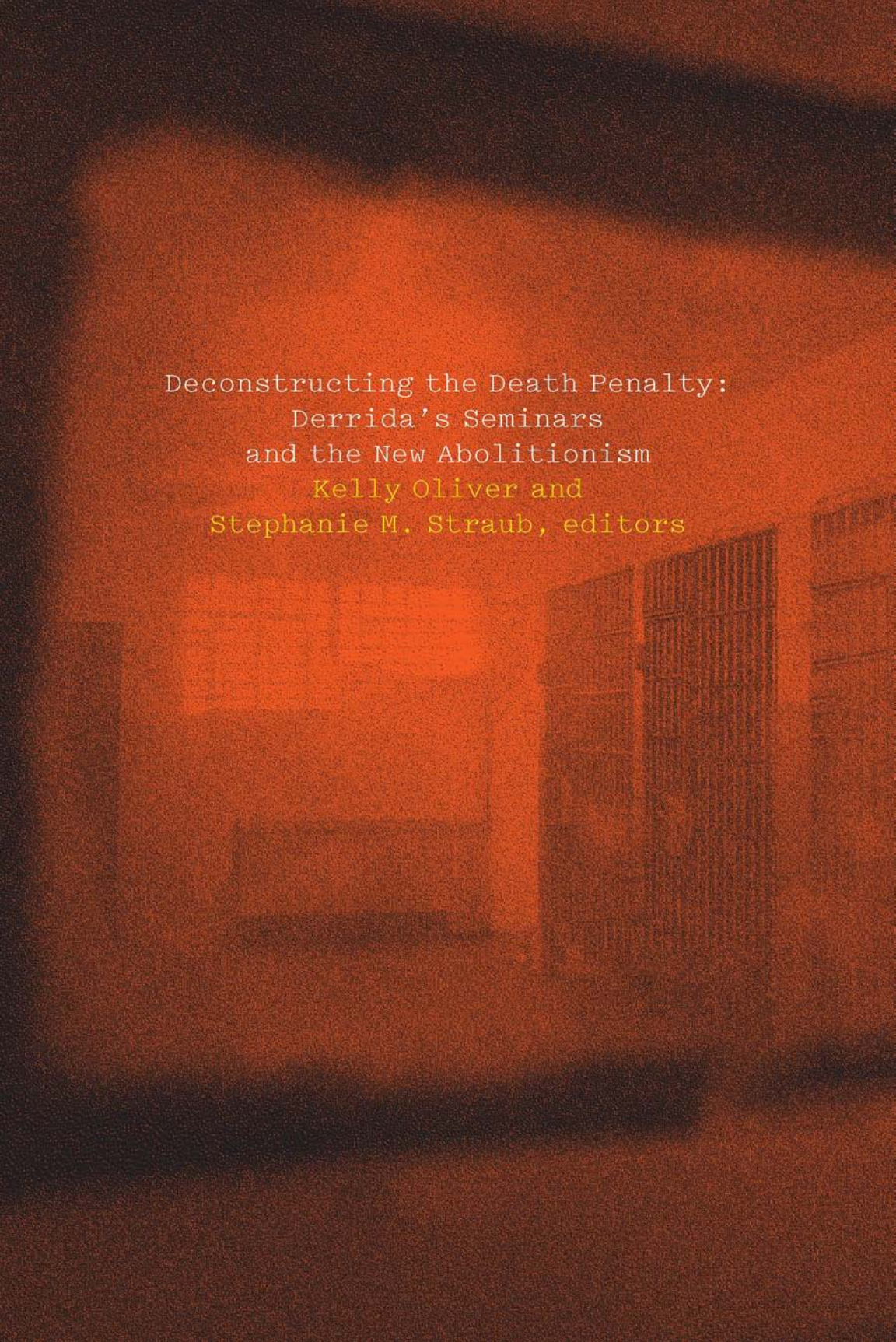
Deconstructing the Death Penalty:
Derrida's Seminars
and the New Abolitionism
Kelly Oliver and
Stephanie M. Straub, editors

VISIT…

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Kelly Oliver
and Stephanie M. Straub
Editors

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INTRODUCTION

From Capital Punishment to Abolitionism: Deconstructing the Death Penalty

Stephanie M. Straub

On December 8, 2016, exactly one month after Donald Trump had been elected president of the United States, Ronald B. Smith was put to death in the state of Alabama after a deadlocked Supreme Court refused to grant a stay of execution in his case.[1] After being administered a lethal dose of potassium chloride, Smith reportedly began coughing, heaving, and clenching his fists for thirteen minutes, finally dying at 11:05 P.M.[2]

When I first began writing this introduction, I had hoped that capital punishment might be abolished in the United States in the near future. At that time, it may have seemed strange to revisit a series of lectures on capital punishment from 1999, given the dramatic changes that had occurred in the American abolitionist movement, critical legal scholarship, and philosophical work on sovereign power. Today, however, the urgency of this volume is, unfortunately, all too clear. The current chief executive of the United States has signaled his extreme support of the death penalty, once going so far as to take out a full-page ad in the *New York Times* and three other newspapers advocating for the execution of five young black men accused (wrongly) of assaulting and raping a white woman jogging through Central Park.[3] Indeed, Donald Trump's intervention in the case of the

so-called Central Park Five marks a pivotal moment in his rise to power, perfectly encapsulating the racially charged authoritarian rhetoric that has become the defining characteristic of his political career. In his theatrical displays of power, his massive rallies (that have continued well past the conclusion of the 2016 presidential campaign), and his claim to singularly represent the voice of the people of the United States, Trump has undoubtedly become the terrifying new face of sovereign power.

The present volume, then, is sadly timely, especially given the radical nature of Derrida's abolitionism. Although the Death Penalty Seminars focus very specifically on the issue of capital punishment, Derrida's deconstruction of the theologico-political logic of sovereignty interrogates, at its most basic level, the authority that the state holds over life and death. While Foucault argues that the contemporary death penalty is the result of a shift from traditional forms of sovereign power to new forms of regulatory power, Derrida's investigation probes the continuing influence of older models of sovereignty that continue to shape contemporary justifications for the most extreme applications of state power.[4] However, Derrida also extends his analysis beyond the criminal justice system, turning his critical eye toward abolitionist discourses. Ultimately, in dismantling the logic of abolitionism, Derrida hopes to formulate a new form of abolitionism, one that would not rely upon problematic theologico-political structures. Even as he gestures toward this new form of abolitionism, however, Derrida cautions that the end of capital punishment will not be the end of the death penalty. Its logic, he warns, will live on in augmented forms and will continue to claim lives.[5] This new abolitionism, then, will have to adapt to the shifting forms the death penalty takes and to the constantly evolving forms of sovereign power.

Admittedly, the American abolitionist movement has evolved dramatically in the sixteen years since Derrida first issued his call to end capital punishment. Activist scholars have increasingly asserted the necessity of radically reforming the entire U.S. criminal justice system, transforming the discourse around capital punishment such that it is now impossible to address abolition in an American context without also confronting the stark realities of racial inequality and mass incarceration. Just two years after the conclusion of the Death Penalty Seminars, Angela Y. Davis published *Are Prisons Obsolete?* (2004), highlighting racial disparities in American policing and challenging social justice advocates to question the very practice of incarceration.[6] Following in Davis's footsteps, Michelle Alexander argues that the mass incarceration of black men has effectively replaced the Jim Crow laws, serving as a legal framework to deny African Americans

the basic rights of citizenship.[7] More recently, many others have examined the deeply interconnected relationship between the prison-industrial complex and the practice of capital punishment, drawing on the work of philosophers, activists, and intellectuals from an incredibly diverse array of backgrounds and disciplines.[8] To prison abolition advocates, then, Derrida's prolonged investigation into the discourses surrounding capital punishment may seem strangely limited in its scope. And, of course, following the extra-legal but state-sanctioned murders of Trayvon Martin, Eric Garner, Michael Brown, Tamir Rice, Aiyana Stanley-Jones, Alton Sterling, Freddie Gray, Laquan McDonald, and countless others—far, far too many others to name here—it is impossible to ignore the fact that capital punishment is not the only means of execution in the United States. In targeting the logic rather than the practice of capital punishment, however, Derrida issues a radical challenge to the theologico-political state itself. Indeed, the Death Penalty Seminars both set up and foreshadow Derrida's extensive critique of sovereign power in his final seminars, *The Beast and the Sovereign*.

The present volume, then, represents an interdisciplinary effort to continue Derrida's work and to begin to articulate what that new abolitionism might look like. These essays place Derrida's arguments against capital punishment in dialogue with contemporary intellectual debates about mass incarceration, sovereign power, and the human-animal divide, widening the scope of Derridean abolitionism far beyond the practice of capital punishment. Drawing upon the insight from the fields of philosophy, law, psychoanalysis, political theory, feminist theory, religious studies, and posthumanism, our contributors work to mobilize Derrida's abolitionism against the ever-evolving logic of sovereignty. Admittedly, this volume will likely chiefly be of interest to Derrideans; however, it is our hope that Derrida's abolitionism will prove adaptable enough to serve an extensive range of activists and scholars. By dismantling the theologico-political framework that undergirds not only the death penalty but all forms of state-sanctioned violence, we aim to formulate a versatile form of abolitionism—a methodological framework for confronting not only the death penalty as we now know it but mass incarceration, police brutality, and all the death penalties still to come.

Part I, "Reading Derrida's Death Penalty Seminars," provides a comprehensive introduction to Derridean abolitionism. The authors of these essays—among whom we are lucky to count the translators of both volumes of the Death Penalty Seminars—effectively explain and expand upon Derrida's key interventions: his unconventional deployment of literature,

his psychoanalytic framework, and his understanding of the exceptional nature of capital punishment. In her essay, Peggy Kamuf examines Derrida's unusual decision to begin his critique of the death penalty with literature rather than philosophy. Kamuf emphasizes that literature does not claim to represent absolute truth—instead, literature demands for itself the right to say anything and everything. In her reading of Jean Genet, whose work features prominently in the Death Penalty Seminars, Kamuf argues that literature serves as a desacralized form of heresy. Literature can thus speak back to sovereign power; simultaneously, by presenting their work as fiction, modern authors can protect themselves from the fates of previous heretics. In its absolute right to speech, literature has the capacity to give voice to alternative voices and alternative forms of reason. It is in fact literature's fundamental ambiguity, she suggests, that allows for the creation of a space outside of sovereign power.

Elizabeth Rottenberg offers a psychoanalytic perspective on the theatrical nature of the contemporary death penalty. While Foucault claims in *Discipline and Punish* that the death penalty ceased to be a public spectacle at the beginning of the nineteenth century, Derrida argues that the modern death penalty remains visible through film and television—that is, the death penalty remains visible by becoming virtual.[9] Rottenberg's essay navigates both Derrida's and Foucault's claims, taking up the phantasmatic scene of execution or Derrida's virtual scene as imagined by Foucault's self-surveilling subject. This phantasmatic scene, she argues, is fundamentally a dream of mastery over death. In her concluding thoughts, Rottenberg pauses to consider the deconstruction itself as just such a fantasy of mastery, a fantasy that Derrida carefully endeavors to resist.

Although Derrida makes relatively few explicit references to psychoanalysis in *The Death Penalty* volume 1, Michael Naas argues that Derrida's deconstruction of sovereignty relies primarily on psychoanalytic discourse. Like Kamuf, Naas privileges ambiguity and multiplicity, noting that sovereign power operates largely by creating the illusion of decision between two absolutely and fundamentally opposed possibilities. Throughout the Death Penalty Seminars, Naas notes, Derrida works to dismantle binary oppositions. In Derrida's deconstructions of the binary logic of sovereign power, however, Naas detects not the influence of literature but the legacy of psychoanalysis. Ultimately, Naas argues, Derrida's very understanding of sovereign power derives from Freud's formulation of the Ur-Father. Sovereignty, according to Derrida's psychoanalytic framework, ultimately precedes binary oppositions—even those between human and animal,

man and god—and the sovereign "decision" must always take the form of indecision.

The role of sovereign decision and indecision takes on central importance in this section's final essay, Christina Howells's "The Death Penalty and Its Exceptions." While advocates for and against the death penalty must recognize exceptions to their arguments, Howells argues that the death penalty itself ostensibly represents the ultimate exception to the normal operation of law—the moment when the state puts one of its own citizens to death. Howells deftly moves between these two senses of the exception, but her main objective is to interrogate the nature of the exception itself. In its ostensibly exceptional nature, the death penalty reveals the hidden perversity of sovereign power, suggesting that the exception may in fact be paradigmatic of the law. Howells ultimately concludes that the exception reveals sovereign power's fundamental illegitimacy.

In Part II, "Derrida and His Interlocutors," Katie Chenoweth, Kir Kuiken, and Kas Saghafi situate Derrida's arguments in context alongside other prominent voices in the Western philosophical canon. In this section's opening essay, Chenoweth attempts to locate Derrida's "new" abolitionism in the work of Michel de Montaigne. Montaigne, Chenoweth insists, may provide a key for understanding the Death Penalty Seminars. Though Montaigne's essays predate debates over the ethics of the death penalty, Chenoweth detects in his description of the trial of Martin Guerre a nascent abolitionism, an "abolitionism to come." Montaigne's abolitionism, she argues, though not yet fully developed—or perhaps because not fully developed—may serve as a model for Derrida's own always embryonic abolitionism, an abolitionism always still to come.

In his essay "'Bidding Up' on the Question of Sovereignty: Derrida between Kant and Benjamin," Kir Kuiken analyzes the escalating logic of "*surenchère*," outbidding or "bidding up." Because the death penalty is a punishment that exceeds any crime and that exceeds the bounds of all legal systems, this logic of excess underlies both pro- and antideath penalty discourses. Notably, the logic of surenchère has been mobilized by both Immanuel Kant in his *Metaphysics of Morals* and Walter Benjamin in his "Critique of Violence." In the Death Penalty Seminars, Derrida suggests Kant and Benjamin understand capital punishment in radically different ways, yet each of their formulations of the death penalty relies upon the same underlying logic. However, Kuiken himself suggests that in his analysis of Kant and Benjamin, Derrida himself is attempting to formulate his own alternative logic of surenchère, a logic that might be repurposed to destabilize the underlying structures of sovereign power.

For his part, Saghafi conceives of both capital punishment specifically and criminal law generally as forms of accounting. Drawing on Heidegger's lecture course *On the Principle of Ground*, Saghafi argues that reason as calculation provides the foundation for judicial law. The death penalty, according to this logic, serves both to dole out punishment in recompense for crimes committed and to ensure the safety of the population as a whole, becoming, effectively, a perverse form of "life insurance." However, Saghafi argues that calculation is always an unstable foundation, as calculation must always reckon with at least the specter of the incalculable. By "incalculable" Saghafi does not mean that which cannot be measured but that which exceeds our capacity for measurement. The death penalty, in his reading, always miscalculates because it represents the law's attempt to account for that which exceeds all calculation.

In Part III, "Extending Derrida's Analysis," Nicole Anderson, Elissa Marder, and Kelly Oliver build upon Derrida's formulation of trial and execution as spectacles of sovereign power. In her examination of the curious practice of medieval animal trials, Anderson argues that both pro- and antiabolitionist discourses implicitly rely on a humanist framework that draws a sharp distinction between human lives and animal lives. While Enlightenment writers, most notably Immanuel Kant, traditionally conceptualize the death penalty as a punishment that can only be applied to moral subjects—that is, human beings—Anderson offers a counter-history of capital punishment that undermines the division between humans and animals. Contra Kant, she suggests that the death penalty has been used to blur the boundary between human and animal, paradoxically both reducing condemned persons to the status of beasts and elevating condemned animals to that of human beings. Following the peculiar logic of capital punishment, Anderson argues that the contemporary "humane" death penalty represents an attempt to reinforce the human-animal divide, distancing us from our animality. Her essay issues a challenge to readers to abolish the death penalty and to assume responsibility for life in all of its vast multiplicity of forms.

While the majority of the essays in this volume treat the public execution as a testament to the power of the sovereign, Oliver instead examines the botched execution as a failed spectacle, one that reveals the fundamental cruelty of the state. Lethal injection, Oliver notes, began as an attempt to render the death penalty humane by making death instantaneous. The botched execution, she argues interrupts fantasies of the painless death by making the process of dying visible and measurable in real time. Oliver's essay consists chiefly of an extended reading of Derrida's use of the image

of Christ's bandages. In his reading of the gospel of John, Derrida focuses particularly on the moment when Mary Magdalene discovers Christ's bandages, lying discarded by the tomb, stripped from the vanished body. For Oliver, this moment, both within the gospel story and within the seminars themselves, interrupts the ordinary flow of time and conjures an alternative temporality. This interruption, she suggests, is crucial to the way in which Derrida performatively constructs his argument. Derrida's goal, she suggests, is to disrupt the fantasy of instantaneous death and to dwell in that moment outside and in between time, a moment of indecision, hovering between life and death.

In this section's conclusion, Marder directly addresses the importance of the visibility of the scene of execution. While capital punishment is ostensibly no longer a public spectacle, Marder argues that all executions—even those that occur within the unseen spaces of prison chambers—are necessarily "public" acts, taking place for the sake of the public and within the public sphere. Marder's chief concern, however, is with the actual machinery of death. Curiously, Derrida notes that death machines are typically feminized, but he demurs from offering any discussion of this phenomenon, aside from an oblique reference to psychoanalysis as a discourse that might be able to account for the sexualization of the death machine. Marder's analysis begins where Derrida's stops short, offering a psychoanalytic reading of the guillotine as a feminized death machine, a device whose labor produces death. Her essay ends with a brief discussion of the telephone as a new, distinctly American, figure of maternal death, an umbilical cord that links the sovereign to the scene of execution.

This collection's final section, "Derrida and Capital Punishment in the United States," addresses the particular importance of the Death Penalty Seminars in the contemporary American context. In his essay, "*Furman* and Finitude," Adam Thurschwell uses U.S. Supreme Court jurisprudence to expand and complicate Derrida's arguments against the death penalty. Thurschwell notes key errors in Derrida's readings of the 1972 *Furman v. Georgia* case (which temporarily ended capital punishment in the United States) and the 1976 *Gregg v. Georgia* case (which reinstated the practice). Rather than excoriating Derrida for these errors, however, Thurschwell seizes upon this moment to extend Derrida's analysis. Through his reading of the opposing opinions of Justices Harry Blackmun and Antonin Scalia from the 1994 *Callins v. Collins* case, Thurschwell argues that both pro- and antiabolitionist death penalty jurisprudence recognizes internal contradictions within the requirements for the application of the death penalty in the United States.

Sarah Tyson turns her critical eye toward the practice of mass incarceration. Her essay, "The Heart of the Other?," argues that sentences of life without parole (LWOP), often treated as "humane" alternatives to the death penalty, essentially constitute social death and would allow for the continuation of an alternative death penalty after the abolition of capital punishment. While Derrida's analysis proves useful to Tyson in arguing against LWOP, she nonetheless expresses skepticism toward his investment in the possibility of mutual recognition. In light of the racial disparities in both mass incarceration and in the application of state-sanctioned violence, Tyson argues that the lives of some are effectively built upon the social death of the Other. Tyson identifies #BlackLivesMatter particularly as a contemporary form of abolitionism that highlights the failure of the recognition that Derrida calls for. Her essay serves as a welcome reminder that abolitionism must remain as adaptive and dynamic as the violence that it would address.

In the section's final essay, Lisa Guenther offers perhaps this volume's most complete formulation of a new abolitionism—in her parlance, "An Abolitionism Worthy of the Name." Guenther places Derrida in conversation with critical race theory and with the work of incarcerated intellectual Mumia Abu-Jamal to argue that racism is, in fact, inseparable from the logic of the death penalty. She persuasively argues that any effective form of abolitionism must move beyond the death penalty to deconstruct the ideology of white supremacy itself. In the final pages of her essay, Guenther turns to the prison abolition movement as an example of such an antiracist abolitionism.

Collectively, these essays speak to the uniqueness of Derrida's abolitionism. Although Derrida dismantles traditional arguments against the death penalty, he offers in their place the possibility of new forms of opposition, based on a shared sense of vulnerability and a recognition of the fundamental illegitimacy of sovereign power. Ultimately, the Death Penalty Seminars do not offer not a fully formed philosophical argument against the practice of capital punishment; rather, they lay the groundwork for future critiques of any and all forms of state-sanctioned killing. Indeed, through his turn to literature and his appeals to his audience's self-interest, Derrida suggests that any exclusively philosophical arguments against the death penalty are inadequate. He thus issues a call for an abolitionism based not on any kind of theologico-political foundation but upon the realities of embodied experience and the universality of death. In this volume, we have attempted to answer that call and to begin to build upon Derrida's foundation. It is our hope that these essays will inspire further

dialogue, as scholars and activists continue Derrida's search for new ways of speaking back to sovereign power and confronting the death penalty in any form it may take.

NOTES

1. Adam Liptak, "Alabama Inmate Executed after Supreme Court Refuses a Stay," *New York Times*, December 8, 2016, https://www.nytimes.com/2016/12/08/us/politics/alabama-ronald-bert-smith-execution-supreme-court.html.

2. Smith had previously challenged Alabama's use of the sedative midazolam in court, citing its role in several botched executions. The court upheld states' right to use midazolam in lethal injections in 2015. See Adam Liptak, "Supreme Court Allows Use of Execution Drug," *New York Times*, June 29, 2015. Arizona, Florida, Oklahoma, and Ohio initially turned to midazolam after pharmaceutical manufacturers refused to supply them with thiopental, the sedative previously used in the three-drug execution protocol. For more information on pharmaceutical manufacturers' efforts to prevent the use of their products in lethal injections, see Ty Alper, "The United States Execution Drug Shortage: A Consequence of Our Values," *Brown Journal of World Affairs* 21, no. 1 (2014): 27–39.

3. "Ronald Smith Heaves and Coughs during Alabama Execution after Tie Vote in Supreme Court Denies Him a Stay," *Death Penalty Information Center*, https://deathpenaltyinfo.org/node/6623.

4. For Foucault's account of the origins of regulatory power, see *Society Must Be Defended: Lectures at the Collège de France, 1975–76*, ed. Mauro Bertani and Alessandro Fontana, trans. David Macey (New York: Picador, 2003). Foucault also notes that the modern death penalty ceases to be a public spectacle in *Discipline and Punish*. See *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage, 1995).

5. Jacques Derrida, *The Death Penalty*, vol. 1, trans. Peggy Kamuf (Chicago: University of Chicago Press, 2014), 282–83.

6. Angela Y. Davis, *Are Prisons Obsolete?* (New York: Seven Stories, 2003).

7. Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2012).

8. Geoffrey Adelsberg, Lisa Guenther, and Scott Zeman, eds., *Death and Other Penalties: Philosophy in a Time of Mass Incarceration* (New York: Fordham University Press, 2015).

9. Foucault, *Discipline and Punish*, 14; Jacques Derrida, *For What Tomorrow . . . : A Dialogue*, interview with Elizabeth Roudinesco (Stanford, Calif.: Stanford University Press, 2004), 159.

PART I

Reading Derrida's Death Penalty Seminars

CHAPTER 1

Beginning with Literature

Peggy Kamuf

"Why, on the death penalty, begin with literature?" asks Jacques Derrida early in the first year of his seminar on the death penalty.[1] The very formulation of the question implies this is such a surprising place to begin that it demands some explanation. Why, indeed, speak of literature just as one is beginning to address the life-and-death issue of capital punishment? Especially if, as he remarks elsewhere, one must profess oneself dumbstruck, "stupefied," by the fact that "never, *to my knowledge*, has any philosopher, *as such*, *in his properly philosophical discourse*, never has any philosophy *as such* contested the legitimacy of the death penalty."[2] This stupefying fact (he calls it "for me the most significant and the most stupefying—also the most stupefied—fact in the history of Western philosophy") should be a goad to undertake what "to my knowledge" no other philosopher in the tradition has done: contest the legitimacy of the death penalty with the means of properly philosophical discourse. To be sure, the effects of this goad are sensible in the seminar, in particular when Derrida goes head to head with Kant, who is positioned as the tradition's most rigorous defender of the death penalty. But even these direct confrontations with Kant's argument are relatively brief compared to the long passages devoted to close readings

of texts by Victor Hugo, Maurice Blanchot, Albert Camus, Jean Genet, or even Robert Badinter, lawyer and author of *The Execution* (1973), a first-person narrative account of the author's unsuccessful defense of a famous capital case in France in the early 1970s. Of these, Hugo and Camus are widely known as vigorous and tireless opponents of the death penalty, whereas Badinter will long be remembered for his efforts to abolish the death penalty in France, which was accomplished while he was minister of justice in 1981.[3] Thus, although not one philosopher in the tradition is on record qua philosopher arguing against capital punishment, for at least two centuries writers and poets (and not only French ones, of course!) have taken strong public stands in favor of its abolition (in which, again, they were hardly alone) and given us literary works able to work against the death penalty.

Now, in light of this stark contrast, Derrida's question—"Why, on the death penalty, begin with literature?"—starts to seem rather less surprising than at first blush. And indeed, after posing the question, he will proceed to remind us of the abolitionist strain in modern literary discourse. But he does so by way of posing a certain "hypothesis," which, he writes, "in its main features would come down to this": "The short, strict, and modern history of the institution named literature in Europe over the last three or four centuries is contemporary with and *indissociable* from a contestation of the death penalty, an abolitionist struggle that, to be sure, is uneven, heterogeneous, discontinuous, but irreversible and tending toward the world-wide as conjoined history, once again, of literature and rights, and of *the right to literature*."[4]

I stress in particular two points from this quotation in order to bring out the key articulations of this hypothesis, the points that most need to be tested or argued. First, there is the idea that the modern institution of literature is not just contemporary with but indissociable from the struggle for abolition of the death penalty. In other words, the contemporaneousness of these two historical currents is not contingent but expresses some necessary relation. But what is that relation? The second phrase I will stress, the right to literature, points the way toward an answer to that question.

Although this phrase is going to recur twice more in the course of these lectures (on pages 108 and 117), it is not in *The Death Penalty* seminar that Derrida explains how he understands it. For that, one may turn to an essay from 1993 where he spells out this right in terms that echo closely the passage just quoted from the seminar.

> I have often found myself insisting on the necessity of distinguishing between literature and belles-lettres or poetry. Literature is a modern invention, inscribed in conventions and institutions that, to retain only this trait, secure in principle its *right to say everything*. Literature thus ties its destiny to a certain noncensure, to the space of democratic freedom (freedom of the press, freedom of speech, etc.). No democracy without literature; no literature without democracy. One can always want neither one nor the other, and there is no shortage of doing without them under all regimes; it is quite possible to consider neither of them to be unconditional goods and indispensable rights. But in no case can one dissociate one from the other.[5]

Manifestly, the indissociable relation posed here between literature (in the modern sense) and democracy accounts for the claim in the seminar that, as we just read, "the institution named literature in Europe over the last three or four centuries is contemporary with and *indissociable* from a contestation of the death penalty." Moreover, by glossing the right to literature as "the right to say anything" ("le droit de tout dire"), Derrida in effect prepares his later claim. But how so? How is the "right to say everything" necessarily associated with opposition to the death penalty?

First, it must be remarked that this right (to say everything) is not someone's right, but the right *of* literature *as* literature in the modern sense. Even though someone exercises it (for example, an author), it is nevertheless not an individual's right, the way the right to vote or freely assemble are individual rights upheld (at least in principle) in a democratic polity. To be sure, this makes the right to literature rather anomalous, but it is just this anomaly that is recognized and protected by democratic codes of law. It is recognized and protected by, for example, boilerplate language printed on copyright pages of books that call themselves novels, novellas, short stories, or, more generally, fictions:[6] for example, "This book is a work of fiction. Names, characters, places and incidents are products of the author's imagination or used fictitiously. Any resemblance to actual events or locales or persons, living or dead, is entirely coincidental."[7] As we know, such statements function formally and publicly to disclaim responsibility to "tell the truth" in the work in question. More broadly speaking, however, they invoke literature or fiction as a right of nonresponse.

Which brings us to a second remark about this right to say everything. It is also the right to say nothing, or rather the right and even the obligation not to respond to a demand to know, to divulge the hidden or inapparent,

to make public what is secret. In the pages we are reading from *On the Name*, Derrida calls this the right to secrecy and acknowledges that only with literature does one encounter something resembling unconditional respect of secrets. Morality, religion, politics, law, as well as all disciplines of knowledge and technology are constituted as authorities entitled to demand accounts and responses of whichever responsible subjects fall under their purview. Literary fictions, by contrast, figure a space of nonresponse to the demand to know and therefore a reserve of unconditional secrecy. To be sure, writers are sometimes deluded into believing they know and can therefore divulge secrets of their characters or the events that happen in their fictional worlds. Yet, even then, they are constrained by the radical dissociation between author and character merely to invent more fiction when pressed to do so—for example, during Sunday morning radio interviews.

To illustrate this right to nonresponse that literary fiction arrogates to itself and that, in a democracy, must be protected, one might recall another text of Derrida's in which he reads and interprets in a nearly exhaustive manner a short prose poem of Baudelaire's, "Counterfeit Money."[8] It is a simple enough story: As they are leaving a tobacco shop, two friends encounter a poor man holding out his cap. Both the narrator and his friend put coins in the cap, but the narrator notices that his friend gives a far larger coin. This prompts him to reflect aloud that his friend is right to be so generous since there is no greater pleasure than causing surprise, meaning the poor man's surprise at such a windfall. Whereupon the friend calmly replies that the coin he gave the other was counterfeit. This sends the narrator off on some wild speculations in his interior monologue about what good fortune or misfortunes might befall the poor man with his counterfeit coin, until the friend shatters this reverie by repeating the narrator's own words to the effect that there is "no sweeter pleasure than to surprise a man by giving him more than he hopes for."[9] Now the narrator is led to excoriate his friend in his mind for having thought "to do a good deed while at the same time making a good deal."[10] The story concludes with the narrator condemning his friend for doing evil not out of malice but out of stupidity.

Derrida, as I said, reads this short fiction in an almost exhaustive fashion, virtually word for word, drawing from it countless connections to his own reflections in *Given Time* on the gift and giving in their supposed distinction from exchange and economy. But for the present purpose what is most telling in Derrida's interpretive performance is the very succinct question he asks about the friend's truthfulness when he claims to have given the poor man a counterfeit coin. The narrator, he remarks, never

wonders whether or not his friend was in fact giving him, the narrator, a truthful account of his action even though this friend has just confessed to passing counterfeit money. "What if," Derrida asks, "with the simulacrum of a confession, he were passing off true money as false?"[11] This possibility would reverse the whole moralizing direction of the narrative, making of the narrator rather than his friend the stupid, credulous, and self-righteous one of the two. The point is, however, that this question can never receive any response that would decide once and for all what was counterfeit, who was duped, and who was generous. And this nonresponse to questions that seek to know is emblematic of what Derrida calls "the secret *of* literature: what literary fiction tells us about the secret, about the (non-) truth of the secret, but also a secret whose possibility assures the possibility of literature."[12] Or, to put it in more paradoxical terms: "The readability of the text is structured by the unreadability of the secret, that is, by the inaccessibility of a certain intentional meaning or of a wanting-to-say in the consciousness of the characters and *a fortiori*, in that of the author who remains, *in this regard*, in a situation analogous to that of the reader."[13]

This inaccessibility, unreadability, or inviolability of the secret, writes Derrida, "depends on nothing other than the altogether bare device of being-two-to-speak."[14] Baudelaire's tale is constructed by means of this altogether bare device. Being-two-to-speak, however, is not as such a condition of literature, of course, but a general one. Derrida points to this general condition when he remarks: "To the extent . . . that *there is dialogue*, there can be lie and inviolate secret."[15] What the literary work exposes, however, is the inviolability of a secret that no interpretation, investigation, or interrogation can overcome. Rather, it is and must be unconditionally respected, which, as we have already noted, sets literature apart from all discourses of knowledge and all forms of social authority (religion, morality, politics, law, science, etc.) that act to penetrate secrecy in their authorized, truth-seeking capacity.

It is this distinctive feature of literature that can take us back to our questions: How is the "right to say everything"—and therefore also nothing, nonresponse—indissociable from opposition to the death penalty? And once again: "Why, on the death penalty, begin with literature?"

Another fictional text can take us further into these questions. At the beginning of the second part of Camus's crime and punishment novel *The Stranger*, the main character and protagonist-narrator, Meursault, describes several interrogations he undergoes by the examining magistrate after his arrest. There are, in particular, two questions to which the magistrate seeks answers from the narrator: First, why did he pause before firing four more

times into the body of the Arab man he has already gunned down? And second, did he love his mother? The first question is put repeatedly and the first time Meursault mutters something about the heat, the sun, the red, hot sand, but thereafter he simply makes no reply:

> "Why did you pause between the first and second shot?" Once again I could see the red sand and feel the burning of the sun on my forehead. But this time I didn't answer. . . .
>
> "Why, why did you shoot at a body that was on the ground?" Once again I didn't know how to answer. . . .
>
> "Why? You must tell me. Why?" Still I didn't say anything.[16]

To the other question, "he asked me if I loved my mother," Meursault does respond but his laconic reply, "Yes, like everybody else," sets off a little crisis in the machinery of justice: "The court clerk who up to this point was typing steadily on his machine must have hit the wrong keys because he got mixed up and had to go back."[17] These nonreponses drape a silence over two discrete events—the death of the Arab, the death of the mother—that, although they seem altogether unrelated, are going to communicate secretly as, precisely, secrets, that is, as holes in knowledge that the prosecutor, judge, and jury are going to have to fill in however they might in order to ground their judgment. They thus open up the two gaps in Meursault's account that will finally condemn him to death.

Camus's novel is almost exactly divided between its two parts, the first of which famously begins "Today, Mama died" and ends with Meursault's killing of the Arab, the same two events that the second part will reconstruct, examine, and pass judgment on through the formalities of interrogation and trial. Although the novel is continuously narrated in the same first person, this two-part structure is nevertheless able to display the incommensurability between an experience of events and their narration. The novel thus positions its readers as witnesses to that incommensurability, to the chasm it creates, into which Meursault is cast when summoned to respond before the law. But it also highlights a kind of secret that Meursault does not so much harbor as suffer or undergo when he is pressed to respond by the law's questions: "Why? You must tell me. Why?" "Did you love your mother?" The secret is inviolable even or especially for Meursault, which does not prevent the representatives of the law lined up against him from filling the hole in knowledge with their judgment. When Meursault reflects on the "ridiculous disproportion" between the contingency of the judgment against him, which might have been altogether different, and the implacable, machine-like necessity of his death sentence once it is pro-

nounced, he throws into relief the only certainty established by his trial: the certainty of its sentence.[18]

If Camus's novel registers a strong protest against capital punishment, it is also because it adopts a device initially tested by Victor Hugo in 1829 in *The Last Day of a Condemned Man*, which is the first-person account of life after a death sentence. It is not, to be sure, a terribly complex device, but it can pack a wallop when the reader is led to identify, as inevitably one is, with an "I" who is also I, any or every I. For as Derrida will come to argue clearly by the end of *The Death Penalty*, what has to arouse the most vigorous condemnation of the condemnation to death is that it kills the very principle of life, which is the incalculability of a future, of the event that comes from an unknowable other. Through its calculation of date, time, place, and means of death, capital punishment would seem, Derrida argues, to put an end to the finitude the condition of which is this incalculability of "my death," the unknowability of the future. As such, the death penalty lives on the phantasm of mastering "my death" by calculating it.[19]

It is probably not insignificant that, when Derrida pauses to ask, "Why, on the death penalty, begin with literature?" he is preparing to read the beginning of Jean Genet's 1943 novel *Our Lady of the Flowers*. To be sure, this is a work that, in so many ways, seizes and exercises the right to literature, the right to say anything. But what will be highlighted in Derrida's reading is another dimension of the indissociable connection between literature and contestation of the death penalty, namely a "desacralization" as performed by profane, secular, post-Enlightenment—that is, modern—literature but also by abolitionist discourse to the extent that that discourse "breaks with the scene and the authority of Exodus and divine judgment."[20] In *Our Lady of the Flowers*, this break registers as a transfer of elements from the narrative of Christ's execution and resurrection to that of the executed heroes of this new evangelist who is Jean Genet. Throughout Genet's work, there is, notes Derrida, "a performance of anti-Christian Christian iconoclasm, of perjury and abjuration fascinated with the very thing that it turns into literature the way one might say to turn into a mockery" (*qu'elle tourne en littérature comme on dirait tourner en dérision*).[21] This literature, in other words, comes out of a turn at once toward and away from the martyred Christ, who was put to death—like Socrates, al-Hallaj, and Joan of Arc—for speech acts claiming to testify to another transcendence, other than the one sanctioned by theologico-political authority.[22] Modern literature—not just Genet's but Genet's in an exemplary manner—comes out of this desacralizing turn that, like the speech of the great executed martyrs, signals to another transcendence. It thus

inherits heretical speech but, in its modern institution, founds no doctrine of belief. In coming under the protection of its disclaimed responsibility as fiction, this new heretic cannot be put to death.[23] And such an exemption or immunity, at least in principle, is unconditional, which carves out for modern literature a singular place from which to view the death penalty as well as societies that carry it out—and to respond from out of its disclaimed responsibility.

Derrida quickly sketches all of this out through the reading of the first two pages of *Our Lady of the Flowers*, which he intercuts with two long citations from the Gospel of John (or Jean, as in Jean Genet, if one is speaking French). The motif that crosses between the two texts, the biblical and the heretical, is the word and the thing *bandelettes* or bandages, one of the first words of Genet's novel: "Weidmann appeared before you in a five o'clock edition, his head swaddled in white bandages." Derrida is then going to wind and unwind these bandages through two passages in the Gospel when John the Evangelist records and testifies to the death and resurrection of Jesus. In the first of these, the dead body of Jesus is wound in "linen clothes" (*bandelettes*) and spices. In the second, John recounts Mary Magdalene's discovery of the empty tomb of Jesus and Simon Peter's seeing the abandoned linen clothes or bandages, bandelettes, in the tomb. Derrida bids us to see how, in the first line of his novel, Genet wraps these holy bandages around the head of multiple murderer Eugène Weidmann, who was publicly guillotined in Paris in June 1939 and who thereby has taken over the signs of glory and transcendence. But in the midst of his commentary on this transfer from the Biblical story to the literary one, Derrida is also going to insert a parenthesis that is important for our purpose. Commenting on the scene at the empty tomb, from John 20:1–18, he writes:

> The bandages do indeed *appear*; they are there all of a sudden; they leap into the light: it is a *phenomenon* that seems to signify, that makes a sign as in a vision. The time of this phenomenon of the bandages, their moment in the story and in the process is very remarkable (and if we had the leisure to do so, if it were the subject of the seminar, we would meditate on *this time of the bandages as the lodging made ready for literature*, for an ascension without ascension, an elevation without elevation, an imminent but not yet accomplished resurrection, etc.).[24]

Literature, then, would come to be lodged in this "time of the bandages" between death and resurrection, beyond life and yet still there, still appearing as Jesus appears to Mary Magdalene when she turns away from the

mouth of the empty tomb and sees a man whom she at first mistakes for a gardener.[25] Like the bandages, then, literature signals as trace of an absence and in a time suspended between all the modes of presence, like Jesus when he appears to Mary and warns "noli me tangere." Derrida flexes long, rhythmical phrases to gloss this ghostly "time of the bandages," for example: "These bandages, the second apparition of the bandages, the untied bandages, abandoned near Christ's tomb, are going to signify that Christ is not dead, that he is no longer dead: he will have been dead; to be sure, he died, but he is not yet resuscitated, not yet elevated: he is still there . . ." and then a little further:[26] "This singular instant, Christ's being-there without being-there, this *Dasein* that is not a *Da-sein*, this *Fort / Da-sein* of Christ who is dead but not dead, who is living dead [*mort vivant*], who is resuscitated but not yet risen, who is here without being here, here but there, over there (*fort*, *jenseits*), who is already beyond without yet being beyond, in the beyond . . . this singular moment that does not belong to the ordinary unfolding of time . . . this time without time . . ."[27]

Like John the Evangelist's, Jean the novelist's story lifts the figure of the executed man in a movement of elevation or ascension. According to the Gospel, it is the lingering shade of Jesus who announces his ascension: "Jesus saith unto her, Touch me not; for I am not yet ascended to my Father: but go to my brethren, and say unto them, I ascend unto my Father, and your Father; and to my God, and your God."[28] As for Weidmann, it is Jean the novelist who conjures "his secret glory" and "his future glory" but who also reports the words of Weidmann himself, the condemned man, which are made to speak for all those whom Genet calls his "unknown lovers" and who died on the scaffold or otherwise at the hands of the state: "As for their death, need I tell you about it? For all of them it will be the death of the one who, when he learned of his from the jury, merely mumbled in a Rhenish accent 'I'm already beyond that' (Weidmann)."[29]

The story turns into literature—and also perhaps into mockery—in the spacing of several phrases that have the form "X without X." This formula recurs at least three times in these pages where Derrida is pursuing our question "Why, on the death penalty, begin with literature?" Most pointedly, the syntax "X without X" is twice apposed to literature in the parentheses where Derrida, as we saw, lodges it in the time of the bandages, "the lodging made ready for literature, for an ascension without ascension, an elevation without elevation . . ." This "without" between the repetitions does not signal a cancelation; it is not a privative "without" but has instead the effect of suspending the positing force of language. As such, "X without X" names literature's act of positing without positing and of reference

without referent.[30] It names the act of fiction, in a word, this heresy that every would-be democracy is obliged to lodge within/without itself. No democracy without literature, in other words, no democracy without this without, without its transcendence without transcendence, "an ascension without ascension, an elevation without elevation." Jean the evangelist brings the good news of this other transcendence as poetic performance.

Unlike Hugo's *The Last Day of a Condemned Man*, Genet's novels make no claim to be "nothing other than argument, direct or indirect as one wishes, for the abolition of the death penalty."[31] Men like Weidmann, men sentenced to death for the worst crimes, are glorious heroes for Genet's narrators and characters, who dream about, sanctify, and desire them. They are the martyrs of this author's "Christian anti-Christian iconoclasm," as Derrida calls it. These are not innocents wrongly accused; they have not repented or made amends. Like Weidmann, they all can say "I am already beyond that." It is around this figure that Genet's novels are wound like bandages that turn the basest degradation into incomparable poetry. And as such they work against a capital punishment regime that must pretend to ignore its own perverse effects. Genet himself professes that the death penalty or the pain of death, the *peine de mort*, which is the death of the other, is that without which he would not have written. His first two published writings, the long poem *The Man Condemned to Death* and *Our Lady of the Flowers*, are dedicated to Maurice Pilorge, a convicted murderer guillotined in Rennes, France, in February 1939. Nine years later, the dedication of the novel reads: "Without Maurice Pilorge whose death is still poisoning my life I would never have written this book. I dedicate it to his memory."[32] As if to say that the book, with its poetic reveries, fantasies, dreams, and fictions within fictions, was drawn from the poison injected by the other's death on the scaffold. An emblem of this transformation might be found in several lines Derrida quotes from Genet's next novel, *The Miracle of the Rose*. Once again, the narrator is conjuring up the glory that awaits the executed one, a glory to which the narrator aspires: "The purest of them who received that death felt placed, within themselves and on their severed head, the amazing and secret crown, studded with jewels wrested from the darkness of the heart. Each of them knew that the moment his head fell into the basket of sawdust and was lifted out by the ears by an assistant whose role seems to me strange indeed, his heart would be gathered up by fingers gloved with modesty and carried off in a youngster's bosom, adorned like a spring festival."[33]

Genet is here doing just what he is describing: adorning the heart of the other as he tucks it into the bosom of language. The barbaric ritual of

execution thus becomes prelude to a spring festival that, unlike the public beheading, has no witnesses other than this poetic image that forever suspends its referent in its performance.

These works by Genet nevertheless share at least one feature with Hugo's so very different novel, *The Last Day of a Condemned Man*. Both of them invoke the right to literature with its attendant unconditional secrecy. When Hugo appends a long preface to his novel three years after its first publication, however, he more or less dismisses or disavows the fictional appearance of his text, which had been originally published without the author's name in 1829, when France was still ruled by the Restoration monarchy of the time. One of the first gestures of the preface Hugo wrote three years later for a new edition of the novel, then, is to affix his name to a text that had appeared anonymously under a nondemocratic regime.[34] Free to speak his name and, in his name, his opposition to the death penalty, Hugo's later preface all but discards and disowns the fiction, which it qualifies as an "innocent and candid literary form." "At the time this book was published, the author did not deem it appropriate to say everything he thought. He preferred to wait until it was understood and to see if it would be. It was. Today the author can unmask the political idea, the social idea, that he wanted to popularize beneath this innocent and candid literary form. He therefore declares or rather he confesses openly that *The Last Day of a Condemned Man* is nothing other than an argument [*un plaidoyer*], direct or indirect as one wishes, for the abolition of the death penalty."[35]

This long, argumentative preface thus comes to supplement the fictional text so that together they configure something like the indissociable relation of literature in the modern sense and the contestation of the death penalty. Probably no one more insistently than Victor Hugo sought to shape that relation, which is one reason Derrida engages with his writings again and again in *The Death Penalty* (although, significantly, with none of Hugo's novels). This continued engagement brings out the particular and enduring form that Hugo gave to abolitionist discourse, especially its appeal to a higher, divine law, which is the law of Christ. It also foregrounds its reliance, as principle of its opposition, on the notion of a sanctity of life and its condemnation of cruelty. Hugo, of course, did not just invent these arguments; he also inherited them, like the Christian belief that underlies and permeates all his writings on the death penalty. But he powerfully articulated these themes in a style that is never dispassionate, detached, or, as we say today, objective. Instead, there is always a writer at work against the death penalty, whether those writings are called novels, poems, plays (although as I said, Derrida never engages with any of these fictions), or

else some presumed nonliterary genre—preface, speech to the National Assembly, courtroom argument, or letter to the newspapers. I say "presumed nonliterary" because what is presumed here is precisely the modern institution of literature as fiction that declares itself as such before the law. But one may (and, indeed, one must) read Hugo's work as also taking over a practice of writing that antedates this institution, a practice by which literature is wed to the abolitionist cause not just through its fictions or "literature" in the modern sense but also, even first of all, through the force it musters in general in writing, in the premodern sense of literature as belles lettres. Hugo, and this is not surprising, is thus on the cusp of the shift from the belle-lettristic to the modern, democratic institution of literature, and the most telling sign of this is the eloquence he brings to bear in the abolitionist cause.

In this regard, Derrida isolates a very telling sentence from an 1862 letter Hugo wrote to an abolitionist leader in Geneva: "Writers of the eighteenth century destroyed torture; writers of the nineteenth, I have no doubt, will destroy the death penalty."[36] Hugo is here identifying his forebears, "writers of the eighteenth century," whose writings destroyed torture (think of Voltaire, in particular). In his commentary, Derrida fastens on the repetition of "destroyed"/"will destroy" in Hugo's pithy formulation and seeks out its connection to writers, writing, and to "what in Europe is called literature."

> It is a question of *destroying* the discursive and other mechanisms, the supports, phantasms, and opinions, the drives, the conscious or semiconscious or unconscious representations, that work to legitimate the death penalty; and this presupposes a certain type of writing, of public speech, and of a certain treatment of language (national and international) that has a privileged tie to what in Europe is called literature, as well as to those citizens who have more or less broken with citizenship, who are sometimes ready . . . to engage in certain acts of civil disobedience, to those citizens of the world who are called writers.[37]

Soldering the links implicit in Hugo's assertion, Derrida arrives at the privileged tie to literature and to a "certain treatment of language" presupposed by the called-for destruction of the death penalty. He bids us to think about this: how "a certain type of writing"—literature in the broadest sense—*works against* the death penalty, as its destruction—if not its deconstruction. Between brackets, he comments thus:

> This word "destroy," used with insistence and deliberately twice, signifies clearly that it is a question of something other than a simple legislative decision or even of an institutional or constitutional, constituting,

> act: it is a question, I don't dare say of deconstructing but in any case of destroying, of attacking, through writing, by speaking and by writing publicly, it is a question of attacking the foundations or the presuppositions alleged by the law or by public opinion wherever the bases of this law or the underpinnings of this public opinion, this *doxa*, or this orthodoxy uphold the death penalty.[38]

Derrida is going to examine under a very close lens the right of the writer to write and speak publicly against what is still the law and thus to act against the law. He shows that for Hugo, and for the filiation of great-French-writers "from Voltaire to Chateaubriand and to Hugo," this right is a sacred one that they give themselves

> to make the law above the laws, to make themselves the representatives of eternal justice above law and thus of divine justice. But to make the law, to invent a new law, here, is simply to appeal to a divine law, to a divine justice that has *already* spoken, a law older than they and more ancient than men, a law that must be *invented* but in the sense of being discovered or found . . . ; the writer, therefore, does not perform new laws; he does not invent or produce a new code of law except by listening, by knowing how to listen in his heart to a divine law that already speaks.[39]

As I said, this idea of the writer's sacred right is hardly Hugo's invention; indeed, there is no possible invention—in the ordinary sense of the term—when everything returns finally to God and was already spoken by Him. This is the largest issue Derrida has with the example of Hugo's abolitionist discourse and a reason, no doubt, he does not dare call its destruction a deconstruction: for it stops short, considerably short, of taking apart the theologico-political scaffolding holding up the institution of capital punishment in the first place.

All of which leaves the question of a right to literature that does not return to God as its inventor and guarantor. As I said, this right is not discerned to individuals so much as it is claimed by an act performed under the license of literature in the modern sense. Perhaps, however, in this wholly modern, post-Enlightenment, post-Revolutionary, dare I say, *democratic* sense, literature is another kind of "God," but, if it were possible, a god without sovereignty, without power, without *Gewalt*, thus a god without god, or to recall the earlier phrases Derrida elicited from his reading of Genet, a transcendence without transcendence, "an ascension without ascension, an elevation without elevation." Literature, an impossible name of a powerless god.

This repeated syntax of "X without X" could take us, through Derrida's reading of his work, to Blanchot and, in this context, to his 1948 essay "Literature and the Right to Death," to which the fourth session of *The Death Penalty* is largely devoted.[40] These pages are dense with long quotations from Blanchot's forbidding and unforgiving essay, which even Derrida, or perhaps especially Derrida as one of Blanchot's most persistent and probing readers, hesitates to align either for or against the death penalty, which is invoked here in its most emblematic form for any Frenchman or Frenchwoman: the massive guillotining of those summarily judged to be *ennemis publics* by the authorities of the Terror, the original terror, if you will, of the French Revolution.

I mentioned at the beginning of this essay that *The Death Penalty* seminar invokes the phrase "right to literature" three times, the first of which I have already glossed. Another place this phrase occurs is here in the fourth session, in the course of the reading of "Literature and the Right to Death." Having aligned in a compelling way and in opposite corners Hugo's discourse on the sacredness of the right to life with the "right to death" named in Blanchot's title, Derrida remarks how "the simultaneity, the synchrony, the concurrence of two great discourses, of two great irreconcilable axiomatics (a humanism of the Enlightenment [i.e., Hugo] and its opposite)" also concurs in making it a question of rights and of a "right to . . ." There follows from this a passage that is tightly articulated around this phrase "the right to," either to death or to literature, the one or the other, the one as the other. I quote it at some length:

> And it is always around the idea of right, of human rights. For if one wants to sharpen the intention of Blanchot's text, and the singular, though frightening, terrifying, properly terrorizing beauty of its title, one must clearly understand that the right to death signifies the right to accede to death (to think it, to open oneself to it, to cross its limit) both by exposing oneself to losing it, or even by giving it to oneself [*en se la donnant*] (suicide) and by giving it [*en la donnant*] in putting to death or inflicting the death penalty. It is the right to kill oneself, to be killed, or to kill: to accede to death by exceeding natural life, biological or so-called animal life. Death is not natural. And this right that is the condition of literature, the condition in the sense of the element, the *situation* of literature, this right is not a right among others. It is both the right that gives birth to literature as such, but also the law that gives birth to the law itself. There is no law or right that would not be or imply a right to death. Literature is what would think this

> right of right, this right to right, and this revolutionary right poses the right to literature.[41]

What is "frightening" and "terrifying" when Blanchot's intention is sharpened like this is the dissolve that happens between the origin or "birth" of literature and the "birth" of law when each is granted the right to death: to put to death, to take a life, as we say, to accede to death, or simply to die although there is nothing simple about it, as Blanchot also recalls when he writes and repeats several times in this essay, "death is the impossibility of dying." But this same impossibility gives rise or gives birth (and Derrida underscores "birth" when he writes that it is "both the right that *gives birth to* literature as such, but also the law that *gives birth to* the law itself") to the law that executes a death penalty, for example (but this is the exemplary example of execution by the law, the force of law). Because Blanchot's essay inscribes literature, in the most general sense, within the dialectical "work of the negative"—which Derrida asserts is a "correct and necessary" reading of this text from 1948—it has to give one pause as to the leverage it provides against the death penalty. Indeed, it gives one far more than just pause since this famous essay aligns the right to literature with the right to death delivered by the exemplary instrument of modern capital punishment, namely, the guillotine under the Revolutionary Terror. The writer, writes Blanchot, "sees himself in the Revolution."[42] The "literature that contemplates itself in revolution," and above all in the Revolutionary Terror, is born, in effect, from the same bed as the death imposed and executed by a death penalty. "Revolutionary action," Blanchot writes, "is in every respect analogous to action as embodied in literature: the passage from nothing to everything, the affirmation of the absolute as event, and of every event as absolute." Blanchot gives only a slight nod toward the instrument of punishment, properly so-called, and toward the punishment called capital. It is when he notes, almost by preterition, that "Death under the Terror is *not simply punishment* for seditionaries, but, as the unavoidable, in some sense desired lot of everyone, it appears to be the very operation of freedom in free men."[43] Which means that it is not simply punishment, but it is not punishment at all since it is "in some sense [the] desired lot of everyone" and thus the fulfillment of a universal desire, which is to give oneself death, in other words, to negate everything and to negate that negation of everything called death, in an act of pure freedom. At which point, we may well need Derrida's reminder to recall endlessly "the properly terrifying and sinister resonances and connotations of this terrorist, terrorizing thinking of literature, of this literature as Terror."[44]

A fuller analysis of Derrida's reading of this essay, and of how it inflects the seminar's general preoccupation with the indissociable link between literature (in the modern, post-Revolutionary sense) and the death penalty, would have to follow it through a counterbalancing or countervailing turn, where other motifs and threads are aligned, ones that balance out or even contradict the "terrorizing thinking of literature" as something like a general, unlimited death penalty as the ultimate freedom of literature.[45] With this counterbalancing, Derrida checks a potentially unjust reading—"I would be unjust if at this point I abandoned the reading and the terrible diagnosis aimed at or against this text"—and refuses "to condemn it to death, to the death it demands."[46]

One should not, I believe, hear mere metaphor in this refusal to condemn to death *a text* and a text like this—or like any other that invokes and is given the right to literature. On the contrary, it is the right to literature that reserves or preserves the reason one can always find *not to be unjust*, the reason to suspend, stay, or cancel a death penalty—and we call that a pardon. This is not calculative reason, but a reason, a possible impossible reason that begins by, as one says in French, *donner raison à l'autre*, in an expression where reason is also and at once right, where giving reason to the other gives him/her/it right, says "yes, you're right" and you have the right to have reason given to your right to say, which must also be always your right to literature. "No democracy without literature, no literature without democracy."

This figure that is not a metaphor of condemning to death a text (e.g., Blanchot's text) made me think, as I was looking for my conclusion, of a passage from the seminar that is very near its conclusion, just a page before the end of the last session. It is not this ultimate or penultimate position that brought it to mind, however, but rather the figure of a door or a window that has been closed once and for all, that has been, as one also says in French, condamné, condemned. This figure of a condemned door or window stands for all the other possible figures of the condemnation-to-death. It is in such figures that the death penalty, "some death penalty," will survive no doubt for, as Derrida avers, "other figures will be found for it; other figures will be invented for it, other turns in the condemnation to death, and it is this rhetoric beyond rhetoric that we are taking seriously here. We are taking seriously here all that is condemned whether it be a life or a door or a window."[47]

What is this "rhetoric beyond rhetoric" that Derrida says he takes seriously? It is where figures and so-called metaphors become the reserve of presumed proper meaning. There one can condemn a life just as one con-

demns a door or a window and vice versa. There proper sense is suspended from figural meaning—and, once again, vice versa. It is where, it is there, that literature-to-come can engage with every figure in which the death penalty survives. If literature still has a future, if literature is literature-to-come, then it inherits with its right all the figures of that right to death as death penalty that Blanchot names. It inherits them, which is to say, the literature-to-come comes also from or as the past that, as William Faulkner said, is "not even past."

I will stop there, with Faulkner as one of the proper and exemplary names of literature.

NOTES

1. Jacques Derrida, *The Death Penalty*, vol. 1, trans. Peggy Kamuf (Chicago: University of Chicago Press, 2014), 29.

2. Jacques Derrida, *For What Tomorrow. . . : A Dialogue*, interview with Elisabeth Roudinesco, trans. Jeff Fort (Stanford, Calif.: Stanford University Press, 2004), 146; see also the chapter "The Philosopher, as Such, and the Death Penalty," in Peggy Kamuf, *To Follow: The Wake of Jacques Derrida* (Edinburgh: Edinburgh University Press, 2010), 187–93.

3. See Badinter's subsequent book *L'Abolition* (Paris: Librairie Arthème Fayard, 2000), which recounts the fight in the French parliament to abolish the death penalty in France.

4. Derrida, *Death Penalty*, 1:30.

5. Jacques Derrida, "Passions: An Oblique Offering," trans. David Wood, in *On the Name*, ed. Thomas Dutoit (Stanford, Calif.: Stanford University Press, 1999), 28. For another reading of these pages on "the right to say everything," see chapter 9 in Peggy Kamuf, *Book of Addresses* (Stanford, Calif.: Stanford University Press, 2005), esp. 180–83.

6. And as often as not, the general designation of "fiction" appears only in this legal disclaimer.

7. Although it is, precisely, boilerplate and thus hardly an original source, this language is in fact from the copyright page of Stephen King's *The Green Mile*: *The Complete Serial Novel* (New York: Pocket Books, 1996).

8. See Jacques Derrida, *Given Time: I, Counterfeit Money*, trans. Peggy Kamuf (Chicago: University of Chicago Press, 1992).

9. Ibid., n.p.

10. Ibid., n.p.

11. Ibid., 96.

12. Derrida, *Death Penalty*, 1:153.

13. Ibid., 152.

14. Ibid., 153.

15. Ibid., 151.

16. Albert Camus, *L'Étranger* (Paris: Gallimard, 1942), 104; my translation.

17. Ibid., 103–4.

18. Ibid., 165.

19. For some analysis of this argument, see my "At the Heart of the Death Penalty," *Oxford Literary Review* 35, no. 2 (2013): 241–51.

20. Derrida, *Death Penalty*, 1:30.

21. Derrida, *Death Penalty*, 1:32.

22. Derrida begins the first year of his Death Penalty Seminars by convoking these four figures put to death by the state for religious crimes.

23. One could certainly point to contemporary counterexamples (e.g., the fatwa against Salman Rushdie), but they would underscore that the right to literature is a democratic right.

24. Ibid., 34; emphasis added.

25. John 20:14–15.

26. Derrida, *Death Penalty*, 1:34.

27. Ibid., 37.

28. John 20:17.

29. Derrida, *Death Penalty*, 1:37–38.

30. On this phrase "reference without referent," see Jacques Derrida, "The Double Session," in *Dissemination*, trans. Barbara Johnson (Chicago: University of Chicago Press, 1981), 217.

31. Victor Hugo, 1832 preface to *The Last Day of a Condemned Man*, in *Écrits sur la peine de mort* (Arles, France: Actes Sud, 1979), 9.

32. Derrida quotes this dedication in *Death Penalty*, 1:33. For a detailed account—and rectification of Genet's fictionalized account—of Genet's friendship with Pilorge, see François Sentein, *L'assassin et son bourreau: Jean Genet et Maurice Pilorge* (Arles, France: Actes Sud, 1999).

33. Jean Genet, *The Miracle of the Rose*, quoted in Derrida, *Death Penalty*, 1:39.

34. The so-called July Monarchy installed in 1830 was hardly a full-fledged democracy, but it did cancel many forms of censorship put in place under the deposed regime.

35. Hugo, *Écrits sur la peine de mort*, 8–9.

36. Derrida, *Death Penalty*, 1:102.

37. Ibid., 102–3.

38. Ibid., 102.

39. Ibid., 108.

40. On this syntax in Blanchot, see Jacques Derrida, *Parages*, ed. John P. Leavey (Stanford, Calif.: Stanford University Press, 2011), 76–78; and in

relation to Kant's Third Critique, see Jacques Derrida, "Parergon," in *The Truth in Painting*, trans. Geoffrey Bennington and Ian McLeod (Chicago: University of Chicago Press, 1987).

41. Ibid., 117.

42. Maurice Blanchot, "Literature and the Right to Death," in *The Work of Fire*, trans. Charlotte Mandell (Stanford, Calif.: Stanford University Press, 1995), 321.

43. Ibid.

44. Derrida, *Death Penalty*, 1:117.

45. Cf. Ibid., 117–20.

46. Ibid., 117.

47. Ibid., 282.

CHAPTER 2

A New Primal Scene: Derrida and the Scene of Execution

Elizabeth Rottenberg

It's a hell of a thing, killin' a man. Take away all
he's got and all he's ever gonna have.

—CLINT EASTWOOD, *Unforgiven*

Prologue: An "American" Vision

As we know, the United States is an exception. Of the 195 independent states that are members of the United Nations or have observer status, 139 have abolished the death penalty in one form or another: 102 of them (52 percent) have abolished the death penalty for all crimes (in these states, no crime is punishable by death); 7 of them (4 percent) have abolished the death penalty for ordinary crimes (that is, only crimes committed in exceptional circumstances are punishable by death, such as crimes committed in time of war); 30 of them (15 percent) have abolished the death penalty in practice (though still legal in these states, the death penalty has not been used for at least ten years).[1] In other words, a supermajority of the world's independent states, 71 percent of them to be exact, qualify as "abolitionist" according to the Death Penalty Information Center: These countries are either "abolitionist for all crimes," "abolitionist for ordinary crimes," or "abolitionist in practice," and they stand in marked contrast to those countries, highlighted in red on the website, that the DPIC classifies as—and here there would be more to say about this term and its anal-sadistic reso-

nances—"retentionist."[2] Of the fifty-six "retentionist countries," countries that maintain or retain the death penalty for ordinary crimes, I will list just a few: Afghanistan, China, Iran, Iraq, North Korea, Pakistan, Saudi Arabia, Sudan, the United Arab Emirates, Yemen—and the United States. How is it, one might ask, that the United States, "the most Christian democracy in the world," as Jacques Derrida has called it, stands not with the Christian, European West ("old Europe") when it comes to the death penalty but with countries whose human rights abuses have so often been decried by its own State Department?[3] How is it that the United States is today "the only great, Western so-called democracy with a European-Judeo-Christian culture" that retains the death penalty?[4]

In *Democracy in America*, Alexis de Tocqueville famously speaks of American exceptionalism: "The American position is, therefore, entirely exceptional and it is quite possible that no democratic nation will ever be similarly placed."[5] When abolition, as a European and international trend, has become "irresistible," how do we explain America's surprising retentiveness?[6] How do we account for its peculiar retentionist tendencies? One may of course conclude that America is a uniquely violent and unforgiving place, a perpetual Wild West. Or one may dismiss it, as Freud did, as a kind of cultural aberration. Following his visit to Clark University in 1909, Freud is reported to have said the following to Ernest Jones: "America is a mistake, a gigantic mistake, it is true, but nonetheless a mistake."[7]

But what if we read the American exception otherwise? What if we read it not only as an example of aberration, which it most certainly is, but also, at the same time, as an exemplary aberration? What if, in other words, the American exception allowed us to see the death penalty differently: not as a freak and unfortunate accident of history but as the figure—indeed, the privileged figure—of a more originary aberration or desire, one that could never simply be abolished by law (American or otherwise)? What does the example of American retentionism tell us about the difficulties that lie in the path of an "effective end" to the death penalty?[8] And how would such an understanding help us in the abolitionist struggle?

With these questions in mind, let me turn for a moment to a rather spectacular vision of the death penalty, one that brings together, with great irony, the death penalty, the (im)possibility of its abolition, and the "American spirit." Here, then, is that vision:

> I would like to see a law passed which would abolish capital punishment, except for those states which insisted on keeping it. Such states would then be allowed to kill criminals provided that the killing is not

> impersonal but personal and a public spectacle: to wit that the executioner be more or less the same size and weight as the criminal (the law could here specify the limits) and that they fight to death using no weapons, or weapons not capable of killing at a distance. Thus, knives or broken bottles would be acceptable. Guns would not.
>
> The benefit of this law is that it might return us to moral responsibility. The killer would carry the other man's death in his psyche. The audience, in turn, would experience a sense of tragedy, since the executioners, highly trained for this, would almost always win. In the flabby American spirit there is a buried sadist who finds the bullfight contemptible—what he really desires are gladiators. Since nothing is worse for a country than repressed sadism, this method of execution would offer ventilation for the more cancerous emotions of the American public.[9]

The author of this fight-club fantasy—this unadulterated American-Gladiators-meets-Thunderdome scenario—is Norman Mailer. The same Norman Mailer who would, some twenty years later, go on to write the Pulitzer Prize–winning "true life story" *The Executioner's Song* (1979), which depicts in 1,109 pages the events surrounding the execution of Gary Gilmore by the state of Utah in 1977 (Gary Gilmore was the first person to be executed in the United States after the reinstatement of the death penalty in 1976). *The Executioner's Song* is, of course, also the title of a 1982 NBC film starring Tommy Lee Jones and Rosanna Arquette.[10]

But before the book, and before the movie, Mailer wrote a short article, titled "A Program for the Nation," from which I have just quoted an excerpt. This article was written in response to a survey from *Esquire* magazine[11] in 1959 in which 150 famous people were queried about the 1960 U.S. presidential election: "What, to your mind, should be the most important issues in the election?"[12] Mailer's article, written "at two or three in the morning in February, 1959," as he reports, lists what he takes to be the five most important issues for the next president.[13] Besides his proposed legislation for "A New Capital Punishment,"[14] these issues include: a bill abolishing all forms of censorship; a bill legalizing the sale of drugs ("it must be recognized that the right to destroy oneself is also one of the inalienable rights");[15] the sharing of American diseases with the Russians ("since the Russians seem to have more vigor than we do at the moment, I would make every effort to pass them our diseases");[16] and, finally, the sentencing to mortal combat of cancer researchers who fail to make progress in their work after two years. In all five cases, whether he is advocating the imposition of stricter deadlines on cancer research, germ

warfare as the best solution to the Cold War, the right to self-destructive self-determination, or a form of therapeutic execution ("this method . . . would offer ventilation for the more cancerous emotions of the American public"), Mailer's humor consists in highlighting issues that could never be addressed by a U.S. presidential candidate in 1960 (or in 2016, for that matter)—the first among them being capital punishment.

Now if I turn to Mailer's program for the nation here, it is not only because he addresses capital punishment as an important, presidential issue. It is also because he insists on the scene of execution in America. There is a scene, says Mailer, that is not being seen: a hidden and invisible and perhaps even disavowed scene. This scene, says Mailer, must be made visible; it must be literally seen (this is his irony): "Those states which insisted on keeping [capital punishment] . . . would . . . be allowed to kill criminals provided that the killing is . . . a public spectacle." America must see what it refuses to see: the scene of execution. What Mailer goes on to describe, however, is a rather un-American scene: no lethal injection here (or to put it less anachronistically: no hanging, no electric chair, no gas chamber here). Instead, Mailer stages his American scene of execution as an epic historical drama; he re-presents an archaic scene, a Roman scene (which is also a scene of desire), as an American tragedy ("the audience . . . would experience a sense of tragedy"). In Mailer's vision of it, then, the scene in question is not something that can simply be located in (historical) time or (geopolitical) space; rather it exceeds the bounds of its particular, twentieth century–American context. Such that one might ask the following question: What would it mean to read an American scene of execution as a virtual Roman scene? Or, to ask the same question in a more (psycho) analytic vein: What would it mean to read the American scene of execution as an archaic or (anal-)sadistic scene?

Indeed, what Mailer's fantasy makes visible—by staging and glorifying, by gladiator-ifying, the violence of capital punishment in America—is not only a Roman scene. It is also a second (or even third) scene, which is really a kind of primal scene: "In the flabby American spirit there is a buried sadist who finds the bullfight contemptible—what he really desires are gladiators." In the deep, dark, fleshy recesses of the American soul lies a desire that is older, younger, more primitive, more archaic than a desire for (European) bullfights. It is a desire for cutting or thrusting weapons (for what are called in French *les armes blanches*: swords, knives, or broken bottles) and a desire for human, rather than animal, sacrifice. Thus, Mailer's insistence on the scene of capital punishment leads him, as it were, behind the scene(s) to the scene's latent structure: "Since nothing is worse

for a country than repressed sadism, this method of execution would offer ventilation for the more cancerous emotions of the American public."

The scene, then, in Mailer's vision of it, would be something that exceeds its particular (empirical, social, political, historical) context. Or, to put it more provocatively, there is no such thing as an *American* scene of execution, which does not mean that people are not executed in the United States. What it does mean, however, is that there remains something excessive, something fundamentally out of joint, temporally and spatially dislocated, about what is called the "American" scene.

It should come as no surprise, therefore, if I move to another scene, another theater . . . this time the Amphi*theater* at L'École des hautes études where, every Wednesday from 5:00 to 7:00 P.M., from December 1999 to March 2000 and then again from December 2000 to March 2001, Jacques Derrida delivered his seminar on the death penalty. One might say that, like Mailer, Derrida calls our attention to the scene of execution—to the essentially theatrical and spectacular nature of the death penalty. Unlike Mailer, however, the scene in question involves not a literal seeing but a virtual or phantasmatic seeing—i.e., a specific kind of visibility that has important consequences for thinking the death penalty (and its future). In what follows, I will highlight two moments of this other visibility: the first is Derrida's insistence on the virtualization of the spectacle ("the spectacle will have continued; it still continues by becoming virtual"),[17] in particular in his critique of Foucault's thesis of "despectacularization"[18] in *Discipline and Punish*; the second is Derrida's appeal, in the penultimate session of *The Death Penalty* volume 1, to the explicitly phantasmatic dimension of the death penalty. As we will see when we get to the phantasm, there is no escaping the scene of execution because there is no escaping the dream of execution; one does not simply put an end to a "phantasmatic truth."[19] But if this "ready-made phantasy"[20] (SE 5: 495) is the case, if there is something "invincible" about the dream of execution, then what would it mean to think—perchance to dream—beyond the death penalty?

Scene 1: The Strategy

But let me begin again. New starting point. Change of scene: "It is dawn, then. Early light, earliest light. Before the end, before even beginning, before the three blows are struck, the actors and the places are ready, they are waiting for us in order to begin."[21]

These lines appear in the opening session of *The Death Penalty* volume 1. Derrida is setting the scene for a seminar in which he gestures again and

again to the "theater of the death penalty" and the "theater of cruelty." For there is no escaping the theater when it comes to the administration of capital punishment: "Always the theater," "condemned to the theater," he says in *The Death Penalty* volume 2.[22] Or, as Mailer says at the very end of *The Executioner's Song*: "Executions must be a spectator sport."[23]

The idea of spectacle is analytically contained or included in the idea of legal execution. Thus, there can be no legal *mise à mort* without a *mise en scène*. Here is what Derrida says in the opening pages of *The Death Penalty* volume 1: "By definition, in essence, by vocation, there will never have been any invisibility for a legal putting to death. . . . There has never been, on principle, a secret or invisible execution for this verdict. The spectacle and the spectator are required. The state, the *polis*, the whole of politics, the co-citizenry—itself or mediated through representation—must attend and attest, it must testify publicly that death was dealt or inflicted, it must *see die* the condemned one."[24]

There can be no invisibility for a legal putting to death. Capital punishment—by definition, in essence, in principle—requires a public: "The death penalty must be accessible to the public in its procedures of judgment, verdict, and execution. . . . Where this is not the case . . . it is not certain that we can, in all rigor, speak of the 'death penalty.'"[25] Nothing is more "publicly theatrical or theatrically public" than a punishment that is administered by the state. Nothing is less private than the criminal law in the name of which a person is condemned to death.[26] "The state," says Derrida, "must see die [*doit voir mourir*] the condemned one." This *seeing-die*, *ce voir-mourir*, is, for Derrida, a *must-see*: It is essential to capital punishment. But let there be no literal or literalizing misunderstanding here. When Derrida says "the state, the *polis*, the whole of politics, the co-citizenry—*itself or mediated through representation*" (my emphasis) it is clear that to be public does not mean, as it did for Mailer (or as it will for Foucault), that the public must literally see the execution or that the death penalty must be visible to everyone. Nor does it mean that it is literally possible to see die (i.e., to locate or pinpoint, *épingler*, as Foucault might say) the "objectifiable instant that separates the living from the dying."[27] Rather, as we will see, a certain virtuality is already inscribed in the very act of witnessing an execution.

But the quotation continues. After pointing to the spectacular dimension of legal execution, Derrida shifts his attention to its *specular* dimension. In short, staging becomes self-staging:

> It is at that moment, in the instant at which the people having become the state or the nation-state *sees die* the condemned one that it best sees

> itself. It best sees itself, that is, it acknowledges and becomes aware of its absolute sovereignty and that it *sees itself* in the sense in French where "il se voit" can mean "it lets itself be seen" or "it gives itself to be seen." Never . . . is the sovereignty of the state more *visible* in the gathering that founds it than when it makes itself into the *seer* and the *voyeur* [voyante *et* voyeuse] of . . . an *execution*. For this act of witnessing—the state as witness of the execution and witness of itself, of its own sovereignty, of its own almightiness—this act of witnessing must be visual: an eye witness. It thus never happens without a stage.[28]

In the scene of execution, sovereignty makes a spectacle of itself; it makes an absolute spectacle of itself. For it is "at that moment, in that instant" in which the state sees die the condemned one, and perhaps not without jubilation, that it "acknowledges and becomes aware of its absolute sovereignty." In this sense, in the sense that the scene of execution is the site of the coming-to-visibility of sovereignty to itself, the scene of execution might also be called the *mirror-stage* of sovereignty. In a way too, and though I hate to say it, I do not think it can be avoided here, in this context of optics and self-reflection, the spectacle of capital punishment becomes a kind of super-selfie: It is the sovereign selfie.

But it is also through this sovereign selfie that the light of a more archaic or foundational scene begins to come into focus. Indeed, Derrida points not only to the coming-to-visibility of sovereignty (to itself) but also to the coming-to-visibility of sovereignty "in the gathering that founds it": "Never," says Derrida, "is the sovereignty of the state more *visible* in the gathering that founds it [*en son rassemblement fondateur*] than when it makes itself into the *seer* and the *voyeur* . . . of an *execution*."[29] Never is sovereignty more visible in its foundational gathering, never is sovereignty more visible in the assembling/gathering (*versammeln*) that is its dawn and first light, than in the state's act of witnessing an execution. To be most visible in its foundational gathering: what does this mean? What would it mean to see a *primal* gathering? Does one *see* a primal scene?

Now I should also say that the above-quoted passage (up through the words "seer" and "voyeur") was posted on the American Psychoanalytic Association's openline listserv on May 17, 2015, two days after Dzhokhar Tsarnaev was sentenced to death in Boston for his role in the 2013 Boston Marathon attack. If I mention this, it is not because I think APsaA should have the last word on this passage but rather because I take it as a sign of an identification or an alliance with Derrida's reading; it is as if psychoanalysis in America (APsaA is, after all, the oldest and the largest psycho-

analytic organization in the United States) were seeing itself in Derrida's deconstruction of the genealogy of sovereignty (a genealogy that passes, in the Death Penalty Seminars just as it does in *Totem and Taboo*, "by way of cruel murder").[30] But let me return to Derrida's starting point: "It is dawn, now, we are at dawn. In the first light of dawn. In the whiteness of dawn (*alba*). Before beginning, let us begin. We would begin."[31]

Why begin in this way? Why set the scene in such a "deliberately pathos-laden fashion"?[32] Why begin a seminar on the death penalty by "pretending to begin before the beginning"?[33] Derrida has in mind, of course, to "analyze the 'scene,' the history of its visibility and of its 'public' character generally."[34] But if he marks the stage in this way, if he "play[s] without playing at the theater . . . as theatrically but also as nontheatrically as possible,"[35] it is also because he desires to change the scene. It is because he wants to bring down the curtain on the death penalty: "It is obvious that in my argumentation and in the pathos you will hear, my discourse is going to be abolitionist."[36] That is, it is a strategy. It is a strategy for thinking a dramatic turn of events—a coup de théâtre. For when all is said and done, it may be impossible to deconstruct "the essential voyeurism that attaches to a putting to death,"[37] "*in absentia* or *in effigie*."[38] In fact, and despite his early programmatic statement to the contrary ("deconstruction . . . is not the psychoanalysis of philosophy"),[39] Derrida's strategy here resembles nothing so much as that of an analyst who, in bringing the theater of a patient's fantasies to the fore in an analytic setting, gives place to the nontheatrical at the heart of the theatrical, the place from which these fantasies can be analyzed and thus potentially transformed.

Just like the analyst who plays without playing at the theater as theatrically but also as nontheatrically as possible, Derrida is laying the groundwork for thinking the possibility of change. Thus, in the final lines of the first session, he shows us the map: "We are here—permit me to recall this because it is essential and decisive at this point—neither in a courtroom or on a witness stand, nor in a place of worship, nor in a parliament, nor in print, radio, or televised news. And neither are we in a real theater [*Nous ne sommes pas non plus dans un vrai théâtre*]. To exclude all of these places, to exit from all of these places, without exception, is the first condition for *thinking* the death penalty. And thus for hoping to change it in some way."[40]

To exclude or exit the theater (in all of its juridico-theologico-political manifestations), this would be the first condition for thinking and for changing the death penalty in some way. But just as there can be no transference interpretation without transference, so too there can be no coup de théâtre without the theater. In other words, we must begin, as Derrida

does in his Death Penalty Seminars, by making the scene of execution as visible and as manifest as possible.

Scene 2: The Virtualization of Visibility

But we have already seen it—and right from the start. By insisting at every turn on visibility, on the essential mise en scène of the death penalty ("by definition, in essence, by vocation, there will never have been any invisibility for a legal putting to death"), Derrida disputes Michel Foucault's claims regarding the progressive disappearance of the spectacular visibility of torture and execution in *Discipline and Punish*.[41] Foucault's thesis, you will recall, is that at the end of the eighteenth and the beginning of the nineteenth century, "punishment had gradually ceased to be a spectacle [*La punition a cessé peu à peu d'être une scène*]."[42] "Punishment-as-spectacle [*le châtiment-spectacle*]"[43] had disappeared and with it the theater of public execution. In the recently published 1972–1973 Lectures at the Collège de France, titled "La société punitive," Foucault even describes the 1757 execution of Robert-François Damiens (with which *Discipline and Punish* famously begins) as the "final staging [*la dernière mise en scène*]" of the great sovereign spectacle of torture and punishment.[44] Instead of the "dismembered, amputated body" and the meticulous ceremonials that belonged to the display of sovereign power in premodern times, the beginning of the nineteenth century ushers in a "new age for penal justice."[45] Punishment, which for Foucault simply includes capital punishment, loses its "visible intensity"; it is less immediately physical, and the sufferings that accompany it, subtler and more muted, are "deprived of their visible display."[46] The theater closes its doors; it is replaced by the prison and the geopolitics of incarceration where what "gets erased [*s'efface*]" is no longer the criminal but the sovereign spectacle. Hence, *Discipline and Punish* marks a division, a rupture, a passage from one episteme to another. Let me quote Foucault here: "At the beginning of the nineteenth century . . . the great spectacle of physical punishment gets erased [*S'efface donc . . . le grand spectacle de la punition physique*]; the tortured body was avoided; the theatrical representation [*la mise en scène*] of pain was excluded from punishment. The age of sobriety in punishment had begun."[47]

We move, in other words, from "one art of punishing" to another, from one "penal style" and "economy of punishment" to another, from one "technique of power" to another—from a society of spectacle and public execution to a society of surveillance where punishment "tend[s] to become the most hidden part of the penal process."[48]

Now it is precisely this shift in the administration of penalties, a shift from the spectacular to the hidden, from the visible to the invisible, that Derrida calls into question.[49] This is why, and it is somewhat compulsive, whenever Derrida mentions the name "Foucault" in his writing on the death penalty[50]—and I will give three examples of this—he does so in order to highlight another logic, another modality of visibility, one that extends the field of the visible beyond "the 'how,' the 'where,' and especially the 'when'" of the premodern "spectacle."[51]

This other logic, which is that of the "virtual," follows closely upon any mention of Foucault (and though this is not exactly Derrida's point in these passages, we might also wonder about the effects of virtual surveillance on Foucault's thesis of despectacularization—in fact, as I was writing this, the Chicago police began to wear body cameras on their uniforms: "'Everybody acts better on film,' said police Supt. Gary McCarthy, who said the [police body-camera pilot] program was 'off to a great start'").[52] The first example is from *The Death Penalty* volume 1, and it is the only explicit reference to Foucault in the whole first year of the seminar. Though Derrida praises *Discipline and Punish* ("It is a rich and important book, a very precious one for us, which I recommend you read or reread"),[53] though he quotes its opening pages and uses the last words of poor Damiens, "Pardon, Lord," to connect his own past seminars on "perjury and pardon" to his present seminar on the death penalty,[54] he cannot help but point to a visibility beyond visibility that complicates the orderly, historical sequence of *Discipline and Punish*:

> Foucault's book [*Discipline and Punish*] is not a book on the death penalty, but it is a book that deals among other things with the historical transformation of the spectacle, with the organized visibility of punishment, with what I will call, even though this is not Foucault's expression, the *seeing-punish* [voir-punir], a *seeing-punish* essential to punishment, to the right to punish as right to see-punish(ed), or even as duty-to-see-punish(ed) [*devoir de voir-punir*], one of Foucault's historical theses being that at the beginning of the nineteenth century, what "gets erased" is, I quote, "the great spectacle of physical punishment; the tortured body is avoided; the staging of suffering is excluded from the punishment. The age of punitive sobriety begins." . . . I am not so sure of this, but perhaps there is here a technical, tele-technical, or even televisual complication of seeing, or even a virtualization of visual perception.[55]

Or again in an interview with Élisabeth Roudinesco in *For What Tomorrow* (where Derrida is speaking of his seminar on the death penalty):

> Contrary to what Foucault says, I don't believe there is a shift from the visible to the invisible in the administration of penalties beginning in the eighteenth century. While I recognize the relative legitimacy of this analysis, according to certain limited criteria, I would be tempted to say that in the evolution of punishments, we shift not from the visible to the invisible but rather from one visibility to another, more virtual, one. In [my] seminar on capital punishment, I am trying to demonstrate that the same process is oriented toward another modality, another distribution of the visible (and therefore of the invisible) that can even, on the contrary, extend the virtual field of the spectacular and the theatrical, with decisive consequences.[56]

Or again in *The Death Penalty* volume 2 (where he is speaking of *The Death Penalty* volume 1): "Last year we took issue with Foucault's thesis of despectacularization, his claims about the modern detheatricalization of punishment; I suggested instead that punishment, which is in the end always public, did not become invisible but only changed its form and its place of visibility by becoming virtual or by virtualizing itself [*en se virtualisant*]."[57]

By becoming virtual, the spectacle will have continued: "Today we can no longer speak of . . . the death penalty without film and television; we have proof of this every day and it is an essential change in the given state of affairs."[58] Film and television but also the media and the Internet will have transformed and extended the field of the visible. Never, says Derrida, "have things been as 'visible' in the worldwide space as they are today; this is itself an essential element of the problem—and of the struggle. Spectral logic invades everything."[59] Spectral logic, here the logic of the "virtual," makes it such that the scene of punishment and execution is never simply visible (or invisible) in Foucault's sense but always marked by the trace of another visibility, of a nonpresent visibility (that is, the trace of something that is not visible determines our experience of the visible, so there is no pure visibility; visibility is always marked by the trace of another visibility). Thus, although it is true, in a certain sense, that punishment and execution have become less and less visible, less and less theatrical, more and more hidden and invisible, it is also true that we have more and more visibility through technical, teletechnical, and televisual means.

What this means, however, is that there is something visibly unmasterable, abyssal, and unattributable about the scene of punishment and execution. Such that Foucault's own masterful attempt to locate power in the organized visibility/invisibility of punishment finds itself unmastered by this logic. Indeed, one might hear in Derrida's language of "virtualization"

another way of pushing Foucault to think "Beyond the Power Principle."[60] Now before I jump to the phantasmatic scene of execution in the penultimate chapter of *The Death Penalty* volume 1, I would like to turn briefly to a strange moment in *Discipline and Punish* where Foucault describes the "real subjugation [*un assujettissement réel*]" that results from a "fictitious relation [*une relation fictive*]."[61] In this passage, which is remarkable in many ways, one might say that Foucault sees without seeing, and knows without being able to take into account, what Derrida has been saying all along, namely that "capital punishment remains fundamentally [*en son fond*] . . . a spectacle"[62]—and just to make my point in advance, I will tell you that this last quotation comes not from Derrida's Death Penalty Seminars but from *Discipline and Punish*.[63] What Foucault describes in this passage is a fictional, a phantasmatic, or virtual scene, an internalized spectacle in which the prisoner in the Panopticon sees himself being seen. Although Foucault sees only a "calculated, organized, technically thought out" subjection in this scene of self-surveillance, I will suggest instead that it presents us with a scene from which we can begin to think an excess of play in the panoptic machine.[64]

In "The Means of Correct Training," the chapter that immediately precedes "Panopticism" in the "Discipline" section of *Discipline and Punish*, Foucault points to the importance of the examination in the rise of disciplinary power. The examination, says Foucault, "combines the techniques of an observing hierarchy and those of a normalizing judgment."[65] It is a technique of surveillance designed to single out and judge individuals. Foucault devotes several pages to the examination in both its medical and educational applications before advancing a statement, which seems to follow directly and rather unproblematically from the central thesis of *Discipline and Punish*: "*The examination transformed the economy of visibility into the exercise of power*."[66] Such a sentence, you have to admit, beautifully summarizes the movement away from visibility that I have pointed to in Derrida's critique of Foucault. And yet, this is not what Foucault says, at least not in French. The French line reads: "*L'examen intervertit l'économie de la visibilité dans l'exercise du pouvoir*," that is to say, *the examination reverses* (intervertit) *the economy of visibility in the exercise of power*.[67] It is not, in other words, that we move from an economy of visibility, on the one hand, to an exercise of power, on the other, which is how the translator understands it (here, by being too Foucauldian, he forgets to read Foucault). Rather, we move from one economy of visibility to another economy of visibility when we move from a society of spectacle to one of surveillance. The examination reverses or inverts that which is visible; it changes who or what is seen.

Thus, the very process of despectacularization is not only a move from visibility to invisibility; it is also, at the same time, a repositioning or repositing of visibility. What Foucault goes on to say makes this perfectly clear:

> Traditionally, power was what was seen, what was shown and what was manifested [these are all reflexive verbs in French: *le pouvoir*, *c'est ce qui se voit*, *ce qui se montre*, *ce qui se manifeste*]. . . . Those on whom it was exercised could remain in the shadows [*dans l'ombre*]; they received light only from that portion of power that was conceded to them, or from the reflection of it that for a moment they carried. Disciplinary power, on the other hand, is exercised through its invisibility; at the same time it imposes on those whom it subjects a principle of compulsory visibility [*un principe de visibilité obligatoire*]. In discipline, it is the subjects who have to be seen. Their visibility assures the hold of the power that is exercised over them. It is the fact of being constantly seen, of being able always to be seen, that maintains the disciplined individual [*l'individu disciplinaire*] in his subjection.[68]

Thus, Foucault describes the passage from relations of sovereignty to relations of discipline as a chiasmic reversal. The power that was visible ("Traditionally, power was what was seen") becomes invisible ("Disciplinary power, on the other hand, is exercised through its invisibility"), while the reverse is true for those who are on the receiving end of punishment. Traditionally, those on whom power is exercised remain invisible, "in the shadows," whereas now they are driven into the limelight ("Disciplinary power . . . imposes on those whom it subjects a principle of compulsory visibility"). But what remains constant and completely unchanged in this reversal is the principle of visibility/invisibility as a principle of power or mastery. Power (whether sovereign or disciplinary) is the power to make visible and/or invisible.

And nowhere is this power more explicit or more literal than in the "political anatomy" of "Panopticism."[69] "The Panopticon," says Foucault, "is a machine for dissociating the see/being seen dyad: in the peripheric ring, one is totally seen, without ever seeing; in the central tower, one sees everything without ever being seen."[70] The Panopticon makes completely visible those in the peripheric ring while making completely invisible those in the central tower. The reason for this distribution of visibility/invisibility is that when it comes to the power of disciplinary power, less is more: The less visible, the less external, the less physical a mechanism, the more effective, the more efficient, and the more insidious its power. But nothing

quite compares to the marvel that is the Panopticon—"The Panopticon," says Foucault, "is a marvelous machine [*une machine merveilleuse*]":

> [With the Panopticon] it is not necessary to use force to constrain the convict to good behavior, the madman to calm, the worker to work, the schoolboy to application, the patient to the observation of regulations. . . . He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he plays them out spontaneously on himself [*il les fait jouer spontanément sur lui-même*]; he inscribes in himself the power relation in which he simultaneously plays both roles [*il joue simultanément les deux rôles*]; he becomes the principle [*principe*] of his own subjection. By this very fact, the external power may throw off its physical weight; it tends to the non-corporal; and, the more it approaches this limit, the more constant, profound and permanent are its effects: it is a perpetual victory that avoids any physical confrontation and which is always played out in advance [*toujours jouée d'avance*].[71]

What Foucault is describing here—and what he calls "panopticism"—is the process whereby intersubjective relations are transformed into intrasubjective ones ("he inscribes in himself the power relation [*il inscrit en soi le rapport de pouvoir*]"). The power relation is transposed in fantasy from the "outside" to the "inside"; it is taken within the psyche such that the relation of subjection is lived out on the intrapsychic level. Freud calls this process "internalization [*Verinnerlichung*]" and he too found it "very remarkable [*sehr merkwürdig*]."[72] Whether or not Foucault intends to limit this internalization process to societies of surveillance (which would mean, I suppose, no superego before the eighteenth century), one thing is clear: There is a fictional and even theatrical dimension to this process. To be seen is at the same time—"spontaneously," "simultaneously" says Foucault—to see oneself being seen. Thus, the disciplined individual (the convict, the madman, the worker, the schoolboy, the patient) sets up an agency within himself to watch over him, "like a garrison in a conquered city"; he plays and replays for himself a scene of surveillance.[73] In this scene, he plays both roles, "il joue . . . les deux rôles"; he plays them out on himself, "il les fait jouer . . . sur lui-même." He occupies both roles, *à tour de rôle*, as one might in a dream—he is inmate and guard, schoolboy and examiner, patient and doctor, victim and executioner. Indeed, the echo is not only Freudian but also Baudelairean: "Je suis la plaie et le couteau! . . . Et la victime et le bourreau! [I am the wound and the blade! . . . The victim and the executioner]." In becoming the "principle of his own subjection," the

convict, the madman, the schoolboy, the patient is also the principal actor or star player in a scene of subjection. Or to put it another way: In this phantasmatic scene of (self-)surveillance, the disciplined individual becomes the master of ceremonies.

To play both roles, to become the master of one's own subjection, where does this lead us? For Foucault, it leads only to "a real subjection."[74] By taking the Panopticon into himself and establishing his own private Panopticon ("he inscribes in himself the power relation in which he simultaneously plays both roles"), the prisoner plays into the hands of the other, of the external power, precisely because this external power is now inside him ("non-corporal" and invisible). In other words, Foucault sees the play between inside/outside, auto-surveillance/hetero-surveillance, auto-punishment/hetero-punishment as merely the effect of a disciplinary machination. Thus, although Foucault may rage against the machine and its "calculated management of life,"[75] the victory of external power is "always played out in advance."[76] It is always played out in advance because we are part of its mechanism (*rouage*).

But what if we saw the "fictitious relation" (i.e., the phantasmatic scene of surveillance) in a more Freuderridean vein? What if we saw the scene as precisely exceeding, or better yet e-luding (and the French here would be *dé-jouer*), the grip of our common sense (or conscious) belief in the oppositional distinction between inside/outside, internal/external, auto-/hetero-? What if, in other words, we read the scene of self-surveillance as a scene of "real subjection" and, as I have suggested with and against Foucault, as a scene of virtual mastery? Indeed, what if what this scene of virtual mastery made visible was something essential to punishment?

Perhaps, then, we might read Foucault's disavowal of the theatrical nature of modern punishment—the fact that he sees without seeing that punishment remains fundamentally a spectacle—as a different sort of recognition.[77] One that would lead us to ask a different sort of question: What if there were something about the scene of virtual mastery that made it both unthinkable for a thinker wedded to the modern detheatricalization of punishment and intolerable? Might there not be something intolerable about a virtual collusion (and to collude is to play with, *colludere*) with "real subjection"?

Scene 3: The Dream of Deconstruction

But here I would like to recall a difference: Namely that, unlike Foucault, for whom the death penalty becomes but another example of power-

knowledge in a specific regime of punishment, Derrida considers the death penalty to be the example par excellence of sovereign power. Along with war, the death penalty remains the "best emblem of the sovereign power of the state over the life and death of the citizen."[78] This is why the deconstruction of the death penalty is not simply "one necessity among others, a particular point of application."[79] Rather, "deconstruction is perhaps always, ultimately . . . the deconstruction of the death penalty, of the logocentric, logonomocentric scaffolding in which the death penalty is inscribed or prescribed."[80]

As a result, the theater of the death penalty is not simply one theater of punishment among others. Indeed, if Derrida returns again and again to the scene of execution, it is because, as we have seen, it is the primal or foundational scene of sovereignty; it is the moment in which sovereignty becomes most visible "in the gathering that founds it."[81] But if he insists on the logic of virtualization—against Foucault's logic of "devisibilization"[82]—it is because this primal scene of sovereignty is bound up with future scenes of punishment, that is, with the very question and possibility of abolition (with the question of the abolition of the death penalty but also, by extension, with the question of prison abolition). To disavow the spectacle—to see without seeing the virtualization of visibility, as Foucault does—is thus also to disavow the way in which the scene of the foundational gathering of sovereignty is projected into the future. It is to miss not only the foundational element of the spectacle but also its temporalization: the relation between primal and future scenes of punishment. In the end, I hope to show how the linking of these questions (the question of what comes before with the question of what comes after) throws new light on the "actual" theater of the death penalty and on its future projections.

Derrida begins Session 9 of *The Death Penalty* volume 1 with a question: "When to die finally [*Quand mourir enfin*]?"[83] When to die, in the end, since we are all fated or "condemned to die"? "What is the right age to die, if there is one?"[84] These questions lead him to imagine a thought experiment: "If . . . I was given the choice between being condemned to death at age seventy-five (guillotined) or being condemned to die at age seventy-four (in my bed)," what would I choose?[85] Indeed, this same choose-your-own-death adventure reappears in the opening pages of *The Death Penalty* volume 2:

> If, condemned to dying sooner or later, like everyone else, I had the choice between, *on the one hand*, dying at such and such an age, tomorrow or later today, of natural causes, as the result of an automobile

> accident or an illness (like almost everyone, in fact), and, *on the other hand*, of dying at another age, later, the day after tomorrow, in a year, ten years, twenty years, in a prison, because I will have been sentenced to death by capital punishment (the guillotine, the electric chair, lethal injection, hanging, the gas chamber), what would I choose, what age would I choose for my death?[86]

The point obviously is not to choose but rather to show that what is at issue in this "choice," and thus what is at issue when it is a question of the death penalty, is a "certain modality, a certain qualification of living and dying . . . a theater, a scene of giving-life and of giving-death, indeed of giving-oneself-death."[87] So the choice is not between life and death, between living or dying, or even between two objective ages of death; the choice is between two modes of an "unavoidable and always imminent death,"[88] between two theaters of death, or—and Derrida will use the word "intolerable" here to characterize both sides of the alternative—two relations to calculation, mastery, decidability, and the question of "when":

> The alternative is terrible and infinite: I may deem it intolerable, and this is the case of the death penalty, to know that the hour of my death is fixed, by others, by a third party, at a certain day, a certain hour, a certain second, whereas if I am not condemned to death but only to die, this calculable knowledge is impossible. But conversely, I may deem it intolerable not to know the date, the place, and the hour of my death and thus I may dream of appropriating this knowledge, of having this knowledge at my disposal, at least phantasmatically, by getting myself condemned to death and thus by arriving in this fashion at some calculable certitude, some quasi-suicidal mastery of my death. . . . By knowing at what hour, on what day I will die, I can tell myself the story of how death will not take me by surprise and will thus remain at my disposal, like a quasi-suicidal auto-affection.[89]

To know, or not to know "when"—that is the question that divides, "as with a knife blade, two deaths or two condemnations, the condemnation to die and the condemnation to death."[90] Whether it is more intolerable to know the moment, the date, the precise hour of one's death (cf. the "'given moment' or the 'designated place' of the given moment of 'my death.'"[91]) or not to know at which instant death will come, and by opposing this nonknowledge with the calculable certainty of the death penalty, arrive at some quasi-suicidal mastery of my death.

However paradoxical it may seem, both positions are not only possible but also inseparable. For both are predicated on a relation to a force that

comes "into" me from a beyond that is greater than I am. Indeed, the point is that, in both cases, my time-of-life-and-death—the (im)possibility of my future—is determined by what comes to me from the outside, from the other. On the side of the death penalty, it is too obvious, but it is an "obscure obviousness that one must begin by recalling."[92] Let me quote, therefore, four short passages in order to recall this obvious fact—the fact that the death penalty is first and foremost *la mort venue de l'autre*, "death that comes from the other":

> The death penalty, as the sovereign decision of a power, reminds us perhaps, before anything else, that a sovereign decision is always the other's [or of some other: *une décision souveraine est toujours de l'autre*]. Come from the other [*Venue de l'autre*].[93]

> Even in cases . . . where the death sentence might be obscurely, compulsively, irresistibly sought, desired—as desire itself—by the condemned one . . . the death penalty is always, by definition, death that comes from the other [*la mort venue de l'autre*], given or decided by the other, be it the other within oneself. The possibility of the death penalty . . . begins where I am delivered into the power of the other [*livré au pouvoir de l'autre*], be it the power of the other in me [*fût-ce au pouvoir de l'autre en moi*].[94]

> The death penalty . . . [is] a death that comes from the other [*venue de l'autre*], decided and calculated by the other, in the hands of the other.[95]

> Where death comes to me from the other [*où la mort me vient de l'autre*], the death penalty is the only experience that, in principle, allows the very moment of death, the *given* moment of death to be a moment that is both *desired* [voulu] and publicly dated.[96]

The death penalty is death that comes from the other; it is death that is given, decided, calculated by the power of the other (be it the power of the other in me, the power of the outside inside me). It implies, in principle, "that the other knows and sometimes that I know, to the second, to the minute, in a way that is therefore calculable, the moment of 'my death.'"[97] To be condemned to death, in other words (and here we must distinguish the condemnation to death from the condemnation to die), implies the power of the other as the one who decides, sovereignly: "You will die and you will die in such a way and you will die on this day, at this hour."[98] And what is decided by the power of the other, what is "delivered up to the calculating decision of the other," is my time of life and death: "the time

given or the time taken, time that becomes the calculation of the other."[99] In the case of the death penalty, what comes to me from the other is, one might say, my death date, the given moment of my death.

But this death that comes to me from the other is also, says Derrida, the only example of a death whose instant is calculable by a machine or by machines (in the plural)—"not by someone, finally, as in a murder, but by all sorts of machines: the law, the penal code, the anonymous third party, the calendar, the clock, the guillotine or another apparatus."[100] This is why one must also speak, as Derrida does, of the "machine of the death penalty"[101] or, as Harry Blackmun did in *Callins v. Collins* (1994), of the "machinery of death."[102] But the worst, that is to say, the most intolerable but also, as we will see, the most fascinating and the most seductive of these machines, is the clock. Indeed, one cannot think the torture and cruelty of the calculating decision without thinking its relation to clockwork: "You will die . . . in that calculable place, and from blows delivered by several machines, the worst of which is perhaps neither the guillotine nor the syringe, but *the clock and the anonymity of clockwork*."[103]

In the end, what is intolerable (in the first sense) and what we oppose when we oppose the death penalty is not death, "or even the fact of killing, of taking a life."[104] What we oppose when we oppose the death penalty is the calculating decision, the calculation imposed on what is—and should remain—an incalculable future. And this is where the foundational element that distinguishes Derrida's thinking of the death penalty from Foucault's is also strangely—how shall I put it?—"heartening," for what comes to us originally from the other is both death- and life-giving. For there is no way for me to speak of "my life," that is, of my relation to an "incalculable and undecidable future," without first naming what "comes from the other," or from what Derrida lyrically calls the "heart of the other":[105]

> The insult, the injury, the fundamental injustice done to the life in me, to the principle of the life in me, is not death. . . . It is rather the interruption of the principle of indetermination, the ending imposed on the opening of the incalculable chance whereby a living being has a relation to what comes. . . . It is because my life is finite, "ended" in a certain sense that I keep this relation to incalculability and undecidability as to the instant of my death. It is because my life is finite, "finished" in a certain sense that I do not know, and that I neither can nor want to know when I am going to die. Only a living being as finite being can have a future, can be exposed to a future, to an incalculable and undecidable future that s/he does not have at his/her disposal like a master and that comes to him or to her from [the] other, from the

> heart of the other [*qui lui vient de l'autre, du cœur de l'autre*]. So much so that when I say "my life" . . . I have already named the other in me . . . the other who . . . lets me be me, the other whose heart is more interior to my heart than my heart itself.[106]

In other words, what comes to me from the other is not only death, calculation and decision, the calculable decidability of the instant of my death, but also life, the relation to incalculability and undecidability, the relation to the "coming of the to-come [*venue de l'à-venir*]."[107] What comes to me from the other, *from the heart of the other*, is thus a certain undecidability as to the instant of my death. And here we would have to think the heart *with* the machine, for a heart is also a machine: It's a time machine, a ticker. We would have to think the "heart" as an excess in relation to the machine itself: at once a machine and something that eludes (*déjoue*) machinelike calculation. We might have to think the heart as something like the "ghost in the machine."

The "I" is thus "invested" by the other. What comes to me from the other, from "the heart of the other," is the force that affirms life in me (the force that "lets me be me") rather than the power or the decision to give me death. "Only thanks to the other," says Derrida, "by the grace of the other heart that affirms life in me," can the finite being that I am have a future, be exposed to a future, to an incalculable and undecidable future that I do not have at my disposal like a master.[108]

One might put this another way—and here we return to the other possible position, that of the second "intolerable." What is intolerable, and that of which I am relieved by the calculating decision, is precisely my exposure to an unmasterable future. By eliminating the principle of indetermination, by determining the instant of my death, by providing protection against what comes from the outside, the calculating machine has a strangely reassuring and pleasurable effect.[109] Whence its seductive power: We are "fascinated by the power and by the calculation . . . fascinated by the end of this anxiety before the future that the calculating machine procures."[110] I may thus dream of appropriating or securing the power-knowledge of the calculating machine by getting myself condemned to death. For it is precisely in putting an end to life that the calculating machine gives the impression of putting an end to finitude: "It *affirms* its power over time; it *masters* the future; it *protects* against the irruption of the other."[111] But of course it only *seems* to do this; it only seems to do this because "this calculation, this mastery, this decidability, remain *phantasms*."[112]

To put an end to finitude, to put an end to the principle of indetermination that comes to us from the other (from some other), this would be our ultimate but also our most fundamental desire: "It would no doubt be possible to show," says Derrida, "that this [desire for calculation, mastery, decidability] is even the origin of phantasm in general."[113] Never is the origin of phantasm more visible, one might say, never is its foundational gathering more manifest, than in the scene in which we give ourselves death (that is, in a scene in which the end of finitude is represented as the end of life). Thus, what the phantasm of the end of finitude makes visible is a primal or final scene of self-protection: self-destruction as self-protection against what threatens to irrupt or break into us from the outside. Why be anxious if there is no future, that is, if the future can be mastered?

But "an end will never put an end to finitude," says Derrida, "for only a finite being can be condemned to death."[114] An end will never put an end to finitude, one might say, because it is already too late. The fear of irruption is the fear of an irruption that has already taken place—in a time before the beginning of time. We are always too late when it comes to the other: "So much so that when I say 'my life,' or even my 'living present' . . . I have already named the other in me."[115] I am invested by the other, says Derrida, "as one is by a force greater than oneself and that occupies you entirely by pre-occupying you"; the other is "before me in me."[116] What comes before, from the heart of the other, is the incalculability of the instant of my death. And it is to this primal incalculability that the calculating decision tries to put an end—by making a scene, as it were. Indeed, we would have to say that the virtuality of any scene of execution (e.g., the fact that the visibility of the death penalty is never simply literal but also virtual) is already a sign or symptom of this primal relation to incalculability. To calculate the incalculable: This would be what "sets [us] to dreaming."[117]

And now for the scene you have all been waiting for . . . a scene that is not only a primal scene but also, as you will see, a primal projector (it is a self-projecting scene). It is a much more unsettling scene than the scene of self-surveillance in *Discipline and Punish*:

> Since this phantasm is at work in us all the time, even outside any real scene of verdict and death penalty . . . we cannot keep ourselves from permanently playing out for ourselves the scene of the condemned one whom we potentially are . . . the fascination exerted by the real phenomena of death penalty and execution, this fascination of which we could give so many examples, has to do with its effect of truth or of

> acting out: we then see it <as> actually staged [*comme mise en scène effective*]; we project it as one projects a film or as one projects a project; we see in projection actually enacted [*nous voyons en projection s'effectuer en acte*] what we are dreaming of all the time—what we are dreaming of, that is, what in a certain way we desire, namely, to give ourselves death and to infinitize ourselves by giving ourselves death in a calculable, calculated, decidable fashion; and when I say "we," this means that in this dream we occupy, simultaneously or successively, all the positions, those of a judge, of judges, of the jury, of the executioner or the assistants, of the one condemned to death, of course, and the position of one's nearest and dearest, loved or hated, and that of the voyeuristic spectators who we are more than ever. And it is the force of this effect of phantasmatic truth that will probably remain forever invincible, thus guaranteeing forever, alas, a double survival, both the survival of the death penalty and the survival of the abolitionist protest.[118]

What keeps the death penalty alive, as it were, is a dream, a desire, a fabulous and virtual scene of mastery in which we occupy all the roles, all the positions, all at once or successively. But if the death penalty fascinates and seduces us, if it promises us the fulfillment of our oldest wish for omnipotence, it is also because it allows us to externalize what is otherwise always (*en permanence*) internally occurring: In the "real phenomena of death penalty and execution," we see "*actually* staged," "*actually* enacted," "*in* projection" what we are dreaming of all the time. What we are dreaming of all the time: What can this mean except that the death penalty is a dream come true? But to express it in this way is also, I hope, to convey something of its obscenity, for what the death penalty tries to play out as "actual" theater is a kind of "internal" primal relation to an "outside" that can never simply be located—and mastered or eliminated—in this way.[119]

So where does this leave us? In a way, one might read Derrida's two-year seminar on the death penalty as a kind of Thanatology of Spirit in which the phantasm of the end of finitude (which "is at work in us all the time") is both the final scene and the opening scene in the spectacle of the death penalty. Or then again, one might read the seminar as a kind of Dream Book. For Derrida not only speaks of the dream of "giving ourselves death in a calculable, calculated, decidable fashion." He also speaks of the "dream of deconstruction" in a somewhat playful manner (indeed, as the dialogue between two angels). And what does deconstruction dream of, you may ask? Why, of deconstructing death, of course, of putting death to death: "Hey [*eh*]," says one of the angels, "at bottom that is the dream of

deconstruction, a convulsive movement to have done with death, to deconstruct death itself . . . to come to blows with death and put it out of action. No less than that. Death to death [*Mort à la mort*]."[120]

In his first moment of temptation ("My angel, who is . . . my temptation"),[121] Derrida describes the dream of deconstruction in terms that belong to a scene of mastery, that attest to a phantasm of omnipotence over death ("Death to death"). But immediately another angel (who is perhaps the same angel—"the same other angel of deconstruction")[122] calls Derrida back to order and tells him that he will not get off so easily, that the dream of deconstruction is not what we would call a "wish-fulfilling" dream: "It is not enough to deconstruct death," says this same other angel, "in order to assure one's salvation . . . in order to survive. . . . For neither does life come out unscathed by this deconstruction. Nothing comes out unscathed by this deconstruction."[123] What we are left with—let me put it this way—is a dream, the same and another, a dream that dares us to think this unprecedented thing: a theater that resists its own spectacle, that is to say, "its specular and spectacular temptation."[124]

Epilogue

In conclusion, I would like to return briefly to the American scene and to a rather remarkable episode in *The Executioner's Song*. Although Mailer's description of the scene of execution certainly accentuates its theatrical elements—"Gary's end of the room was lit . . . and the rest of the room was dark. He was up on a little platform. It was like a stage"[125]—I would like instead to bring up an earlier and eerier scene in which Gary is preparing for his execution. In this scene, which takes place the day before the execution, Gary is insisting that his uncle deliver a posthumous gift to his girlfriend: "Gary said, 'Look, take this watch. I don't want anybody to have it but Nicole.' He had broken it and taped it with the hands set at 7:49."[126]

Gary's parting gift to his girlfriend is a watch. But not just any watch. It is a watch he has broken and taped so that its hands are forever set at the given time of his death: *dawn*, January 17, 1977.[127] It is a little as if he were trying to stage, from beyond the grave, his mastery over the "clock and the anonymity of clockwork."

But I do not want to end on a morbid note. So instead I will describe a new product on the market called Tikker. Fredrik Colting, its inventor, calls it "The Happiness Watch" and claims it was designed to help people make the most of their lives. Here is how the watch is advertised online (at mytikker.com):

> *Anger or forgiveness? Tic-toc. Wearing a frown or a smile? Tic-toc. Happy or upset? Tic-toc.*
>
> THAT'S WHY WE'VE CREATED Tikker, the death watch that counts down your life, just so you can make every second count.
>
> Tikker is a wrist watch that counts down your life from years to seconds, and motivates you to make the right choices. Tikker will be there to remind you to make the most of your life, and most importantly, to be happy.[128]

Colting, who came up with the idea for the "death watch" following the death of his grandfather, explains it this way: "For all of us, life comes with a best-before date. . . . While death is non-negotiable, life isn't. All we have to do is learn how to cherish the time and the life that we have been given; seize the day and follow our hearts. . . . From years to seconds [Tikker] presents time ever moving, never standing still, and our lives dwindling towards the final rest. . . . I think that if we were more aware of our own expiration . . . we'd make better choices while we are alive."[129]

The idea of the Tikker is for its wearers to know "when" they will die (i.e., to be constantly aware of their "death date"). And though the website does not go into much detail about the process, it is clear that Colting has developed an algorithm to calculate this date. Consequently, all wearers are asked to fill out a questionnaire in order to set their Tikkers. They are asked not only about their medical history (including allergies and illnesses, how often they drink or smoke) but also about their families' history of cancer, diabetes, and other diseases. They are asked about their physical activity and their weight, and they receive a "score." Their age is then deducted from this "score" and they are given a "death date" . . . at which point the countdown begins.

However perverse we may find the Tikker and its maker—to say nothing of the algorithm that calculates the wearer's "death date"—there is clearly a market for such products. Records indicate that 2,162 backers pledged $98,665 on Kickstarter to help bring Tikker to life. For there's something unique, even if uniquely intolerable, about an everyday accessory that brings together "this strange coincidence, this bizarre synchrony" of subjective and objective time, ticker and Tikker, heart and clockwork, the condemnation to die and the condemnation to death, the virtual event (Kickstarter) and the calculating machine, happiness and death.[130] Indeed, for all its perversity, the "death watch" puts a certain death penalty back on stage as if to submit it to the "hypothesis of a mutation."[131] It is a little as if the Tikker campaign were saying: "If there will always be 'some death

penalty,'[132] if, as Derrida says at the end of *The Death Penalty* volume 1, the future of the death penalty lies in the figures that will be invented for it, why not invent a figure for the death penalty, a symbolic deathwatch, we can live with? Why not a virtual death penalty?"

And yet even this figure of the death penalty may give us pause. For it repeats, albeit symbolically, the illusion that the future is a countdown and the heart merely a ticking machine. Since this essay is already too long, let me simply end by quoting my good friend and colleague Michael Naas who, bless his heart, had only this to say when I told him about the Tikker watch: "Let's just hope," he said, "your Tikker gives out before your ticker does." By which I took him to mean—but who can say for sure, we were talking on the phone—that there would always remain something undecidable about what comes to us from the other.

NOTES

An earlier version of this essay was presented as a lecture at the Collegium Phaenomenologicum in July 2015 as part of the three-week seminar devoted to "Derrida's Seminars" organized by Michael Naas; it was published in *The Oxford Literary Review* 38, no. 2 (2016): 188–220.

1. See "Abolitionist and Retentionist Countries," Death Penalty Information Center, last modified December 31, 2016, http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140. My numbers do not include the Cook Islands, Niue, or Taiwan since these countries are not yet member states of the United Nations and do not have observer status.

2. Ibid.

3. Jacques Derrida, *The Death Penalty*, vol. 1, trans. Peggy Kamuf (Chicago: University of Chicago Press, 2014), 192.

4. Jacques Derrida, *The Death Penalty*, vol. 2, trans. Elizabeth Rottenberg (Chicago: University of Chicago Press, 2017), 2.

5. Alexis de Tocqueville, *Democracy in America* (New York: Penguin Books, 2003), 525.

6. Jacques Derrida, *For What Tomorrow. . . : A Dialogue*, interview with Elisabeth Roudinesco, trans. Jeff Fort (Stanford, Calif.: Stanford University Press, 2004), 145.

7. See Ernest Jones, *The Life and Work of Sigmund Freud*, 3 vols. (New York: Basic Books, 1955), 2:60.

8. Derrida, *Death Penalty*, 1:282.

9. Norman Mailer, *The Presidential Papers* (New York: Bantam, 1964), 11.

10. "The Executioner's Song" had also been used as a title in two earlier works by Mailer: first as the title of a poem in *Cannibals and Christians*

(1966) and then as a chapter heading in his documentary novel *The Fight* (1975).

11. In the end, Mailer's article was published not in *Esquire* but in *Dissent* magazine in the winter of 1960. See Mailer, Appendix B, in *Presidential Papers*, 305.

12. Mailer, *Presidential Papers*, 10.

13. Ibid., 305.

14. Ibid., 9.

15. Ibid., 12.

16. Ibid.

17. Derrida, *The Death Penalty*, 1:205.

18. Derrida, *The Death Penalty*, 2:20.

19. Derrida, *The Death Penalty*, 1:258.

20. Sigmund Freud, *The Interpretation of Dreams*, in *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, trans. James Strachey in collaboration with Anna Freud, assisted by Alix Strachey and Alan Tyson, 24 vols. (London: Hogarth Press, 1953–1974), 5:495.

21. Ibid., 3.

22. Derrida, *The Death Penalty*, 2:56n1.

23. Norman Mailer, *The Executioner's Song* (New York: Grand Central, 2012), 1012.

24. Derrida, *Death Penalty*, 1:2.

25. Derrida, *For What Tomorrow*, 154.

26. Derrida, *Death Penalty*, 2:60.

27. Derrida, *Death Penalty*, 1:238.

28. Derrida, *Death Penalty*, 1:2–3.

29. Derrida, *Death Penalty*, 1:3.

30. Jacques Derrida, *Without Alibi*, ed. and trans. Peggy Kamuf (Stanford, Calif.: Stanford University Press, 2002), 244.

31. Derrida, *Death Penalty*, 1:1.

32. Ibid., 2.

33. Ibid., 1.

34. Ibid., xv.

35. Ibid., 3.

36. Ibid., 5n7.

37. Ibid., 4.

38. Sigmund Freud, "The Dynamics of Transference," in *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, trans. James Strachey in collaboration with Anna Freud, assisted by Alix Strachey and Alan Tyson, 24 vols. (London: Hogarth Press, 1953–1974), 12:108.

39. Jacques Derrida, *Writing and Difference*, trans. Alan Bass (Chicago: University of Chicago Press, 1978), 196.

40. Derrida, *Death Penalty*, 1:27.

41. Although a student had presented on the chapter "Right of Death and Power over Life" from Foucault's *History of Sexuality*, vol. 1, *An Introduction* (see editorial note in Derrida, *Death Penalty*, 1:xvi) and Derrida makes a passing reference to "bio-power" in *The Death Penalty* volume 2, *Discipline and Punish* is the only book of Foucault's that is mentioned by name in Derrida's seminar.

42. Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Random House, 1977), 9.

43. Ibid.

44. Michel Foucault, *La société punitive: Cours au Collége de France* (Paris: EHESS Seiul/Gallimard, 2013), 12.

45. Ibid., 8, 7.

46. Ibid., 9, 8.

47. Ibid., 14, modified.

48. Ibid., 257, 7, 24, 9.

49. It is interesting to note that the work of the Groupe d'information sur les prisons (GIP) to which Foucault alludes in *Discipline and Punish* (see 30–31) had, as its working principle, to expose the material conditions of prison life to the public (i.e., "to make the invisible visible," as my colleague Kevin Thompson has put it). Though this work of revealing the deplorable conditions of detention (overcrowding, poor sanitation, lack of medical care, lack of privacy, etc.) certainly did make "visible" what was "hidden" and "invisible" to the public, the notions of visibility/publicity to which the GIP appealed were, importantly, literal: The public must (be made to) see with its own eyes the material conditions of the prisons. Indeed, this literality was its force. But it is precisely this literal notion of visibility that Derrida challenges here.

50. Though there are a number of indirect references to *Discipline and Punish*, there is only one explicit reference to Foucault in *The Death Penalty* volume 1. In *The Death Penalty* volume 2, there are two explicit references to Foucault. The first is simply a casual, parenthetical remark: "again the question of spectacle and visibility, of the voyeurism that we raised last year with and against Foucault, while also reading Hugo and Camus" (see *Death Penalty*, 2:45). The second is the one I cite in my third example. In *The Death Penalty* volume 2, there is also short comment on biopower and Kant. If, for Kant, as Derrida explains, to put to death a guilty citizen according to law and justice is "in no way to dispose sovereignly of his body" then there is in Kant a logic that resists "everything that is today called—in an often confused way—bio-power" (*Death Penalty*, 2:42). Finally, in his interviews with Élisabeth Roudinesco in 2001, Derrida makes reference to the Death Penalty

Seminars and in particular to his critique of Foucault in them (see *For What Tomorrow*, 28, 237, 256). There is also an implicit reference to Foucault in the list of philosophers who have secondarized the death penalty: "Others believed, rightly or wrongly, that they saw in [the death penalty] a particular phenomenon or a mere exacerbation of the penal system, even of imprisonment in general" (*For What Tomorrow*, 146).

51. Derrida, *Death Penalty*, 1:219.

52. See Frank Main, "Chicago Top Cop Says Police Body-Camera Project Off to Solid Start," *Chicago Sun Times*, February 13, 2015, http://chicago.suntimes.com/news/chicago-top-cop-says-police-body-camera-pilot-program-off-to-solid-start/.

53. Derrida, *Death Penalty*, 1:42.

54. The first year of the Death Penalty Seminars did not have its own title; it was simply the continuation of years 1997–1998 and 1998–99, both of which had as their subtitles "Perjury and Pardon." So it was not until the second year of the seminar in 2000–2001 that the subtitle "Death Penalty" appeared in the ENS Annual Report (see editorial note, in *Death Penalty*, 1:xiii).

55. Derrida, *Death Penalty*, 1:43.

56. Derrida, *For What Tomorrow*, 12.

57. Derrida, *Death Penalty*, 2:220.

58. Derrida, *Death Penalty*, 1:247.

59. Derrida, *For What Tomorrow*, 159; modified.

60. Jacques Derrida, "Beyond the Power Principle," trans. Elizabeth Rottenberg, *Undecidable Unconscious* 2, no. 1 (2015): 7–17.

61. Foucault, *Discipline and Punish*, 202.

62. Ibid., 15.

63. And to make matters worse—the same remains fundamentally true of torture. Indeed, Foucault repeats the word "fond" in both cases: Just as "capital punishment remains fundamentally [*en son fond*] . . . a spectacle," so too "there remains . . . a trace [*un fond*] of 'torture' in the modern mechanisms of criminal justice" (*Discipline and Punish*, 15–16). Both spectacle and torture will have continued; they still continue today. What is more, one might argue that Foucault's description of the guillotine gives us an example of a punishment that cuts both ways. On the one hand, it "represent[s] a new ethic for legal death" (15); it "takes life almost without touching the body" and reduces death to a "visible, but instantaneous event" (13). On the other hand, the French Revolution immediately endows it with "a great theatrical ritual" (15) and "for years it provided a spectacle" (15). In the end, it had to be moved "inside prison walls and made inaccessible to the public," so seductive was the spectacle (15).

64. Foucault, *Discipline and Punish*, 26.

65. Ibid., 184.
66. Ibid., 187.
67. Michel Foucault, *Surveiller et punir: Naissance de la prison* (Paris: Gallimard, 1975), 189.
68. Foucault, *Discipline and Punish*, 187.
69. Ibid., 208.
70. Ibid., 201–2.
71. Ibid., 202–3, modified.
72. Freud, *Civilization and Its Discontents*, in *The Standard Edition*, 21:123.
73. Ibid.
74. Foucault, *Discipline and Punish*, 202.
75. Michel Foucault, *The History of Sexuality*, vol. 1, *An Introduction*, trans. Robert Hurley (New York: Random House, 1978), 140.
76. Foucault, *Discipline and Punish*, 203, modified.
77. In this context, one might read Foucault's turn away from death and the death penalty in *History of Sexuality*, vol. 1, *An Introduction*, published just one year after *Discipline and Punish*, as another example of such "recognition." It is as if Foucault had pinpointed the very condition of impossibility of his theory and had then simply excluded it. Thus, Foucault will argue that the procedures of power must turn away from death in order to focus on the management of life: "How could power exercise its highest prerogatives by putting people to death, when its main role was to ensure, sustain, and multiply life, to put this life in order? For such a power, execution was at the same time a limit, a scandal, and a contradiction. . . . Now it is over life . . . that power establishes its dominion; death is power's limit, the moment that escapes it; death becomes the most secret aspect of existence, the most 'private.'" See *History of Sexuality*, 138. In a sense, then, by drawing attention to the death penalty in The Death Penalty Seminar, Derrida begins with Foucault's disavowal, that is, he begins with the limit-case that Foucault has excluded from consideration and asks if the death penalty is not precisely the quasi-transcendental condition of sovereignty: included as excluded.
78. Derrida, *Without Alibi*, 245.
79. Derrida, *For What Tomorrow*, 148.
80. Derrida, *Death Penalty*, 1:23.
81. Ibid., 3.
82. Ibid., 205.
83. Ibid., 218.
84. Derrida, *Death Penalty*, 2:5.
85. Derrida, *Death Penalty*, 1:218.
86. Derrida, *Death Penalty*, 2:5–6.

87. Ibid., 6.
88. Ibid.
89. Derrida, *Death Penalty*, 1:218.
90. Ibid., 219.
91. Derrida, *Death Penalty*, 2:5.
92. Derrida, *Death Penalty*, 1:250.
93. Ibid., 1.
94. Ibid., 250–51.
95. Ibid., 251.
96. Derrida, *Death Penalty*, 2:4.
97. Ibid.
98. Ibid., 137.
99. Derrida, *Death Penalty*, 1:220.
100. Ibid., 257.
101. Ibid.
102. Harry Blackmun dissented from the U.S. Supreme Court's decision denying review in a Texas death penalty case (*Callins v. Collins*) on February 22, 1994. See https://www.law.cornell.edu/supct/html/93–7054.ZA1.html, consulted July 20, 2017.
103. Derrida, *Death Penalty*, 1:256; my emphasis.
104. Ibid.
105. Ibid. For a wonderful discussion of literature and the "heart of the other," see Peggy Kamuf, "At the Heart of the Death Penalty," *Oxford Literary Review* 35, no. 2 (2013): 241–51.
106. Ibid., 256–57, modified.
107. Ibid., 256.
108. Ibid.
109. And how not to think of Freud here and his description of the death drive in *Civilization and Its Discontents*: "Even where it emerges without any sexual purpose, in the blindest fury of destructiveness, we cannot fail to recognize that the satisfaction of the drive is accompanied by an extraordinarily high degree of narcissistic enjoyment, owing to its presenting the ego with a fulfillment of the latter's old wish for omnipotence." Freud, *Civilization and Its Discontents*, in *The Standard Edition*, 21:121, modified.
110. Ibid., 258.
111. Ibid., my emphasis.
112. Ibid., my emphasis.
113. Ibid. As both primal scene and phantasm, the scene in which I give myself death would be both a scene of origin and a scene of closure. In this, it would differ interestingly from Freud's three primal phantasms, all of which are scenes of origin: the "primal scene," which is the scene of the origin of

the subject; "castration," which is the scene of the origin of the distinction between the sexes; and "seduction," which is the scene of the origin of sexuality.

114. Ibid.

115. Ibid., 257.

116. Ibid. In other words, the phantasm of the end of finitude—and here, it seems to me, Derrida is adding a new chapter to *Beyond the Principle*—is the trace of "my life" attempting (but forever failing) to return to the moment before there was the other in me, that is to say, to the moment before life began.

117. Ibid., 240.

118. Ibid., 258.

119. Indeed, I would argue that the profound racialization of the death penalty in the United States is the most outrageous and visible expression of this literalizing violence.

120. Ibid., 241.

121. Ibid.

122. Ibid.

123. Ibid.

124. Derrida, *Without Alibi*, 256.

125. Mailer, *The Executioner's Song*, 1011–12.

126. Ibid., 1014.

127. The official time of death turned out to be 8:07 A.M.

128. See http://mytikker.com, consulted June 1, 2016.

129. See Anne Hodgekiss and Victoria Woollaston, "How Long Have You Got Left to Live?," *Daily Mail*, October 1, 2014, http://www.dailymail.co.uk/health/article-2776230/How-long-YOU-got-left-live-New-Death-Watch-claims-calculate-life-expectancy-based-lifestyle-counts-death.html.

130. Derrida, *Death Penalty*, 1:250.

131. Derrida, *Without Alibi*, 256.

132. Derrida, *Death Penalty*, 1:282.

CHAPTER 3

Always the Other Who Decides

On Sovereignty, Psychoanalysis, and the Death Penalty

Michael Naas

During the final session of the second and final year of his Death Penalty Seminars, Jacques Derrida announced that he would not be continuing the following year with the same topic. He said that while he had not yet decided on a new topic for the next year, he expected it to be one that would develop in a different direction the question of sovereignty that he had been pursuing the previous two years in relation to the death penalty. He said to his seminar audience on March 28, 2001:

> I still don't know what I will do next year; as usual, I hope to find a topic that, let's say, will at once extend, prolong, develop what we are doing here and nonetheless mark a new departure, however contradictory this may seem. . . . Though I have not yet finalized my decision, I was thinking about the question of sovereignty, the history of sovereignty, which is obviously very, very close to everything we have been working on here this year and in past years, but which also calls for new types of approaches. But if any of you has a suggestion, I will certainly consider it and maybe even take it up.[1]

We now know, of course, that Derrida would ultimately decide (in part because of the suggestions of others) to devote a seminar to the question of the relationship between the human and animal, a topic he had treated before and that he would take up for the two years of what would turn out to be his very final seminar, the Beast and the Sovereign.

A year later, then, in the summer of 2002, at the conclusion of the first year of the Beast and the Sovereign Seminar, Derrida reflected back on what he had just done and he confirmed that what links that year to the previous two years of the Death Penalty Seminars (1999–2000, 2000–2001) is indeed the question or problem of sovereignty.

> We pursued the research that in previous years, centering on the problem of the death penalty, had led us to study *sovereignty*, the political and ontotheological history of its concepts and its figures. This year we deliberately privileged what intertwined this history with that of a thinking of the living being, . . . and more precisely with the treatment of so-called animal life in all its registers. . . . The point was not merely to study, from Aristotle to contemporary discussions (Foucault, Agamben), the canonical texts around the interpretation of man as a "political animal." We had above all to explore the "logics" organizing both the submission of the beast (and the living being) to political sovereignty, and an irresistible and overloaded analogy between a beast and a sovereign supposed to share a space of some exteriority with respect to "law" and "right" (outside the law: above the law: origin and foundation of the law).[2]

Derrida thus makes explicit the connection between his final two two-year seminars, the Death Penalty Seminars and the Beast and the Sovereign Seminars. The question of sovereignty will have been, he suggests, the linchpin between them, "the political and ontotheological history" of sovereignty, as he calls it, first in relation to the death penalty and then in relation to the question of the human and the animal.

This acknowledgment is, of course, hardly surprising, since the theme of sovereignty in relation to the theological or what Derrida called the theologico-political or the ontotheological-political was absolutely central to many of his final works. Though Derridean deconstruction was perhaps always and from the beginning the deconstruction of a certain theological or ontotheological conception of sovereignty understood as power, identity, self-identity, and so on, it could be argued that from *The Other Heading* or "Force of Law" onward, passing by "Faith and Knowledge" and *The*

Animal That Therefore I Am, right up to *Rogues*, the deconstruction of the theological or ontotheological origins of sovereignty became an explicit and insistent theme in Derrida's work.

But in his summary of his 2001–2002 Beast and the Sovereign Seminar, Derrida signals something more. In speaking of "some exteriority" with respect to "law" and "right," Derrida seems to be pointing out both his general conception of sovereignty and his overall strategy for addressing it—namely, to move from a consideration of sovereignty or law in a determinate historical context, in a particular author or text, to the question of the origin or ground of sovereignty itself, that is, from sovereignty strictly speaking to some "exteriority" with respect to it. It is a move that can be seen at various points throughout both seminars, though also, and especially, in the transition from the first year to the second of both seminars. In both cases, the question of sovereignty appears to necessitate a consideration of the ground or origin of sovereignty itself.

Whereas Derrida in the first year of the Beast and the Sovereign Seminar thus treats a whole host of figures in the history of philosophy and literature on the relationship between the animal and the human, the beast and the sovereign, from Plato and Aristotle to Bodin, Hobbes, Schmitt, Levinas, Lacan, and Deleuze, to name just a few, he focuses in the second year on just a couple of figures and, indeed, just a couple of texts: Daniel Defoe's *Robinson Crusoe* and Heidegger's seminar of 1929–1930, subsequently published under the title *The Fundamental Concepts of Metaphysics*. What becomes central during this second year is not only the question of the relationship between the human and the animal, the question, for example, of the human's or the animal's relationship to world, but the question of world itself, the possibility of the end of the world, and what Heidegger, by means of the term *Walten*, characterizes as an originary violence that is both the condition of all sovereignty and the undoing of it. While there are hints during the first year that the seminar will end up going in this direction, this move to what exceeds sovereignty is nonetheless somewhat unexpected in a seminar that purports to be about the relationship between the human and the animal in the Western philosophical and literary tradition.

This very same movement can be seen in the Death Penalty Seminars, though it is more difficult to discern at first glance. While Derrida during the first year of the seminar ranges widely over a vast array of figures in philosophy and literature on the death penalty (Plato, Kant, Beccaria, Blanchot, Baudelaire, Hugo, Camus, and the list goes on), his analysis

becomes much more tightly focused on just a few figures and themes in the second year: namely, Kant, Heidegger—yet again Heidegger—on the question of reason, the principle of reason, the ground of reason, and so on, and then Freud, along with his disciple Theodor Reik, on the question of cruelty and the origins of sovereignty or mastery. While most of these themes are, again, all present during the first year, there is a narrowing of focus, as Derrida makes more and more clear that all his questions regarding the history of the death penalty, sacrifice, and so on come down to questions of what exceeds or at least seems to exceed the onto-theological history of sovereignty, questions of a beyond of political sovereignty or the beyond of a kind of sovereignty drive.[3] From the first year of the Death Penalty Seminars to the second, we thus see Derrida placing more and more emphasis on hyperbolic questions that at once develop, deepen, reorient, and, in a sense, disrupt the very progress of a seminar devoted to the question of the death penalty. He moves from more strictly defined discourses for and against the death penalty to a consideration of the ground and origin of reason as well as of sovereignty—just as, in the two-year seminar that would follow, he would move from a more restricted consideration of the relationship between the human and the animal to the question of sovereignty itself.

In what follows, I would like to show precisely how Derrida in the second year of the Death Penalty Seminars takes us, by means of Kant, Heidegger, and, especially, Freud, from the question of sovereignty as theological or theological political, as that which has been used to justify the death penalty by elevating man above mere animal existence, to a notion of sovereignty that would seem to exceed and precede the onto-theological, indeed, that would seem to precede the distinction between the human and God, the human and the animal, nature and law, and so on. In short, I would like to show that Derrida's turn to Kant, Heidegger, and, first and foremost, Freud and the discourse of psychoanalysis parallels in an instructive way his turn to Heidegger and *Walten* in the second year of the Beast and the Sovereign Seminars. As we will see, it is the discourse of psychoanalysis that will allow Derrida to question the sovereignty of a conscious, responsible, autonomous self in a way that recalls, some two years later, his questioning of the end and origin of the world and the origins of sovereignty itself. This move from a theological, political, or philosophical model of sovereignty to a pre-ontotheological conception or figure of sovereignty will have, in the end, profound implications for the question of the death penalty or the relationship between

the human and the animal but and for the project of deconstruction more generally.

The relationship between the death penalty and the theologico-political origins of sovereignty is central to both years of the Death Penalty Seminars. Derrida in fact opens the second year of the seminar by bringing back on stage for a brief encore the four paradigmatic figures of the death penalty that he evoked at the beginning of the first year—Socrates, Jesus, Joan of Arc, and al-Hallaj. All four of these figures, Derrida underscores, were condemned by the state not because they challenged the state and its sovereignty from some areligious or atheological position but because they had an explicitly religious or theological message, a kind of counter-theological or theologico-political message that threatened the power and authority of the state.

After thus recalling these four paradigmatic, theatrical figures, Derrida invokes another figure of political sovereignty, this time from modern liberal democracy and on the side of sovereignty rather than counter-sovereignty—namely, the figure of the "President."[4] Derrida's many reminders that the seminar is taking place just after the election of George W. Bush in November 2000 are enough to help contextualize his many references to the president as a sort of "decision-making center," the president or sovereign as the one who can punish but cannot himself be punished, who has immunity from prosecution, who decides on the exception, who can send citizens to war, put citizens to death, stay an execution, or grant clemency.[5] Later, in the Fourth Session of the seminar, Derrida looks in some detail at Kant's claim in *The Metaphysics of Morals* that the right to punish is a sovereign and irreciprocal right and that, in the end, as Derrida phrases it, "the right to punish and not to be punished is the essential definition of the sovereign," a definition that "is not incompatible," he goes on to say, "either with the Schmittian definition of the sovereign as the one who decides exceptionally on the exception and can (has the right to) suspend law or rights, or with Benjamin's definition of the right of the state as the capitalization or monopoly of violence."[6] The ability to kill or let die in the name of the state is thus intrinsically related to sovereignty, to the exceptionality and exceptional decision of the sovereign, and thus to a certain thinking of the theologico-political. It is this moment of the exception, as Derrida will argue, that at once grounds and escapes the law, founds and eludes it from an always groundless, extralegal or prelegal place.

With the figure of the president now on the table, on the stage, alongside Socrates, Jesus, Joan of Arc, and al-Hallaj, Derrida goes on in this second year of the Death Penalty Seminars to speak explicitly of "the important problematic of the theologico-political and the death penalty," of "the founding of the onto-theologico-political on the right to the death penalty," of the "phallogocentric scaffold of onto-theologico-political sovereignty," and so on.[7] When Derrida follows this up by recalling that there is no philosophy as such, no philosopher qua philosopher, that holds an abolitionist position, we are encouraged to think that there is perhaps some connection, some complicity even, between a philosophy that would itself be dominated or defined by ontotheology or a certain conception of the ontotheologico-political and the death penalty.[8] Whether it is a philosophical conception of the immortal soul or of the incalculable dignity and honor of the human person as an end in itself, some value that rises above life and remains always in excess of life, it is, it seems, by system and not by accident that philosophy and philosophers have supported both a certain notion of the ontotheological and the death penalty. As the legally sanctioned putting to death of an individual in the name of the state and its sovereignty, the death penalty would be an exemplary site for the convergence of theology, politics, and philosophy.

Just as Derrida begins the first year of the seminar by noting that there is almost always some religious figure, a priest, for example, present at the execution, thereby drawing our attention to the conjunction of sovereignty and theology or religion in the death penalty, so he begins the second year by recalling not only philosophy's unanimous support of the death penalty but also the fact, which is clearly not unrelated for Derrida, who, recall, is writing in 2000, that the United States is "the only great, Western so-called democracy with a European-Judeo-Christian culture that maintains and applies in a massive and escalating way the death penalty."[9] Theology, religion, and the political must thus all be thought together, Derrida is clearly suggesting, and it is a certain conception of sovereignty that brings them together and so determines, as Derrida puts it in the first year of the seminar, "*the* question of the death penalty and religion."[10]

We are thus on fairly familiar territory from the previous year and, indeed, from previous seminars in this investigation of a certain theologico-political determination of sovereignty that becomes most apparent with the question of the death penalty but that is not unrelated to questions posed elsewhere regarding hospitality, perjury and pardon, the sovereignty of man in relation to the animal, and so on. Here, as there, Derrida moves back and forth between three centers or foci, three poles of attraction or

three determinations, of sovereignty: namely, the sovereignty—or, rather, the supposed or putative sovereignty—of the self, of the state or the nation-state (the sovereignty of the president, for example), and of God. Though there is good reason, at least initially, to want to keep these three determinations separate, they are, in the end, closely related, the sovereignty of God sometimes serving as a model for a sovereign self and the supposed sovereignty of a unique, responsible, self-identical individual sometimes serving as a model for God. All three are formations of what Derrida in *Rogues* and elsewhere calls by the general name *ipseity*, and it is the relationship between them that will allow Derrida, as we will see, to move from questions regarding the death penalty and the putative sovereignty of the state and the individual to questions regarding the beast and the sovereign, world, and, ultimately, God. For, in the end, to question one of these poles of attraction is to question them all, and when one falls they all fall.

Now I say *putative* or *supposed* sovereignty here because sovereignty is always, on Derrida's account, a fictional or phantasmatic formation that exercises an almost irresistible force over us even though it has no real ontological foundation behind it. Derrida, in fact, argues in several places that it is actually because these formations of sovereignty, these reactive formations of sovereignty, have no real identity or ontological status, because they are phantasmatic, that they have such a power of attraction over us. It is the phantasm of sovereignty that thus needs to be deconstructed insofar as it is not taken as putative or supposed but as real and existing. In the ontotheological tradition we are talking about here, such phantasms are even taken to have the highest degree of reality or being. It is, therefore, the deconstruction of these phantasms of self, nation-state, and God that Derrida sets to work or tries to bring about in all these later works and seminars.

After thus asking the question, still as part of his summary of the previous year, "What is an exception and what is sovereignty?," Derrida poses three new questions for the second year of the seminar, three questions that will begin to shift the analysis to another of those three nodal points of sovereignty: "What is an act? What is an age? What is a desire?"[11] At issue in each of these questions, we quickly come to see, is the sovereignty of the self, that is, the ipseity of a subject of law, of a legal person, whose acts or actions may or may not be completely intentional or entirely conscious, who may or may not be "of age," or, rather, of a single and identifiable age (Derrida suggests that a "single" subject may have many ages), or who may or may not be acting under the influence of some impulse, drive,

or desire. Questions of act, age, and desire: These are but so many ways of calling into question (without simply nullifying) the responsibility of a putatively sovereign, supposedly decisive, legal subject. By means of these questions, Derrida will thus begin to shift the focus of the seminar from the sovereignty of God and of the state to the sovereignty of the individual or the citizen, from the sovereignty of the one who pronounces or ultimately legitimates a death penalty to the sovereignty of the one against whom such a penalty is pronounced.

We are still just in the opening moments of the seminar but Derrida has already posed a series of questions and problems for a notion of the sovereign, responsible subject, the one who is assumed by law and who seems essential for law as it is understood by the philosophical tradition and as it is codified in our judicial systems. For Kant, for example, the sovereign subject would be autonomous to the extent that he or she can give the moral law to him- or herself and so approve his or her punishment. Questions of act, age, and desire all pose serious problems for this seemingly or putatively sovereign subject. We can thus already anticipate that psychoanalysis will have to be one of the privileged sites for posing these questions. For in the twentieth century it was perhaps most powerfully through psychoanalysis, through what Derrida in the closing pages of the Fifth Session of this second year of the seminar calls "the psychoanalytic *revolution*"—a phrase that is perhaps more than just a figure of speech—that the assumed sovereignty of the subject came to be questioned in such an incisive and decisive way.[12] It was psychoanalysis that brought about a revolution in our very thinking of sovereignty, even if the law has, up until now, been unable to catch up to this revolution. As Derrida writes early in the First Session: "Up until now, the law has forbidden itself or has been unable to integrate into its essential axiomatic a logic of the unconscious or the symptom."[13]

It is thus no surprise that the question of the "legal person"—that is, a person who is responsible, sovereign, autonomous, capable of decision, and so on—should be at the center of this second year of the Death Penalty Seminars and that psychoanalysis should be crucial to Derrida's posing of this question, even if, to be sure, Derrida will also pose questions *to* psychoanalysis, questions about its own theory of mastery or sovereignty and about the motives and mastery of its practitioners or theorists, beginning with Freud (and his disciple, Theodor Reik).[14] As Derrida says much later in the Fifth Session, at the heart of the question of law is responsibility, guilt, "in other words, the freedom and consciousness of the subject."[15] The questions of act, age, and desire—questions that psychoanalysis has

posed in an original way and that the law cannot simply ignore—are thus all aimed, in the end, at the supposed freedom and consciousness of this supposedly sovereign subject. For "psychoanalysis . . . threatens the credit that we give, that everyday consciousness and philosophy grant, these concepts"; in short, it challenges nothing less than the self-identity of the sovereign subject of law.[16] As Derrida says in an interview from around the same time as the Death Penalty Seminars, the importance of using psychoanalysis to question such a sovereign subject can be traced back to the very beginnings of his work: "Beginning with *Of Grammatology*, I sensed the properly *deconstructive* necessity of again calling into question the primacy of the present, of full presence, as well as self-presence and consciousness, and therefore of putting the resources of psychoanalysis to work."[17]

Almost everything in the second year of the seminar can thus be read in terms of a rethinking of the unity, boundaries, and meaning of a sovereign subject. For example, in the very early pages of the seminar, Derrida's many references to *choice* and *decision*, one of the supposed characteristics or powers of a sovereign subject, have no other object than to call into question the supposed ipseity or sovereignty of the subject, of a supposedly sovereign, deciding subject. Even Derrida's odd thought experiment in the First Session of this second year regarding two possibilities for dying, one of them by capital punishment and one by natural causes, can be considered from the point of view of this critique of the sovereign subject who decides. "If . . . I had the choice between, *on the one hand*, dying at such and such an age, tomorrow or later today, of natural causes, as the result of an automobile accident or an illness . . . and, *on the other hand*, of dying at another age, later, the day after tomorrow, in a year, ten years, twenty years, in a prison, because I will have been sentenced to death by capital punishment . . . "[18] There are several things to note about this odd hypothetical. First, Derrida's emphasis here is not just on the alternative between two ways of dying but on the choice between them. Second, the choice is not between three ways of dying but two, that is, between various kinds of death that are, somewhat oddly, characterized as "natural"—a car accident, disease—and one that is not. Derrida thus presents himself, and thus us, with a binary choice, the kind that psychoanalysis, not to mention deconstruction, has played an important role in calling into question. Third and finally, Derrida stages a choice between events one does not choose, two of them coming wholly unexpectedly or at least within only vaguely defined parameters (a car accident, disease), and the other, the death penalty, coming after the decision of another, after what seems to be the sovereign decision of another who seems to have determined and chosen for me the time, place,

and manner of my death. The point appears to be that in the case of "natural" death as well as the death penalty, it is always the other who decides—though in the case of the latter we have the impression, the phantasm, precisely, that some identifiable, recognizable sovereign other in the form of the state has actually chosen for me, in my stead. The choice Derrida gives himself is thus between two different ways of *not* choosing death, two different relations to a death that is never simply or straightforwardly "my own." As Derrida puts it, "the choice is not between life and death, nor even between two ages for dying, but between two modes and two times of an unavoidable and always imminent death."[19] It is death, then, that compromises in an exemplary fashion the putative sovereignty of the subject, the power of a sovereign subject to see some possibility coming on the horizon, the moment of one's death. It is precisely this excess of or over the sovereign subject, along with the seeming control or calculation of this excess by means of some sovereign power beyond the sovereign self, that will ultimately provide Derrida with some of the terms of his own philosophical opposition to the death penalty.[20]

All Derrida's questions in this second year of the Death Penalty Seminars thus seem to be posed to the sovereign subject and to his or her power or ability to choose between two alternatives and, first of all, his or her ability to narrow down the field to just two alternatives. For the ontotheological conception of sovereignty that Derrida is calling into question, along with the kind of philosophy that seems to form a system with it, tries always to reduce the field of possibilities to two, forcing us to choose in our analyses or in our conceptual distinctions one or the other. Throughout the seminar, Derrida will thus work with a series of such distinctions or oppositions, that is, with alternatives or choices furnished to us by the philosophical tradition—public and private, conscious and unconscious, internal and external, auto-punishment and hetero-punishment, and so on—and in every case he will hesitate simply to choose the one or the other. Where the tradition presents a binary alternative, inside *or* outside, same *or* other, auto- *or* hetero-, Derrida will argue in effect that other possibilities should be available to thought, more "choices," in short, a differential rather than an oppositional logic, a logic of both/and and/or neither/nor, a thinking of punishment *and* or *as* honor, for example, as we will see in a moment, or of the excluded *as* included, a thinking of the undecidable or of the aporia as what defies but nonetheless demands "choice." At issue here, once again, is nothing other than the power of a sovereign subject, the subject's ability to decide or to choose one thing over or to the exclusion of another.

Derrida will go on to demonstrate in various ways this impossibility of deciding between one of two alternatives that excludes its other. He does this, for example, in a long passage in which he demonstrates the impossibility of maintaining the Kantian distinction between *poena forensis* and *poena naturalis* and the related distinction between hetero-punishment and auto-punishment.[21] But he also does it through linguistic analyses that aim to show that another logic is already in operation in or behind our concepts and our language. In the spirit of Freud's 1910 essay on "The Antithetical Meaning of Primal Words," Derrida uses the etymological analyses of Benveniste in order to argue that, in certain languages, terms that would seem to be fundamentally opposed, the terms for *honor* and *punishment* in Greek, for example, are essentially linked and can even be traced back to a single root.[22] This seems to suggest that certain terms originally bore and perhaps continue to bear the traces of their opposites in such a way that no context can determine or stabilize them, keep the one exterior to or outside the other, give the one a value that would be opposed to and would exclude its opposite. In short, it seems to suggest a notion of language where the putatively sovereign subject simply cannot choose one meaning to the exclusion of others and even one meaning to the exclusion of its opposite.

This was, of course, hardly the first time Derrida appealed to such a strategy. The word *pharmakon*, for example, was already in "Plato's Pharmacy" a privileged example of this fundamental ambivalence of certain pivotal terms. It is not insignificant, then, that Derrida refers in several places in this second year of his seminar on the death penalty, some thirty-five years after "Plato's Pharmacy," to the *pharmakos*, the scapegoat or exile who is at once honored and exiled, exalted and punished or sacrificed. The ambivalence of this term, as it is analyzed by Benveniste and others, seems to support the conceptual analysis Derrida is trying to develop with regard to the death penalty. Hence Derrida will show that, in the Kantian discourse as well, *punishing* and *honoring* are fundamentally related, as if Kant's civilized and enlightened justification of the death penalty were also obeying, in a subterranean way, a more ancient law of ambivalence.[23] Though Kant himself would see no ambivalence here, arguing that it is human dignity or honor, the incalculable or priceless value of the human being as an end in itself, that makes the human worthy of being punished, and, at the limit, of being sentenced to death, the mere juxtaposition of Kant's argument with Benveniste's analysis suggests that one logic may in fact be concealing, rather than simply excluding, another.[24]

With the help of Benveniste, Derrida is also able to sketch out a common configuration between the Greek *pharmakos* and other phenomena of

the excluded as elected, the vilified as honored, in Latin and Christian culture and language. This will include the Benjaminian notion of the great criminal who is at once excluded and celebrated, punished and honored, as well as Genet's glorification of the criminal on the scaffold.[25] This notion of a fundamental ambivalence that would precede strictly defined and opposed terms does more than just call into question the sovereignty of a subject who must decide or choose between two alternatives, who must transform an unregulated ambivalence into a controlled polysemy, and who must turn a kind of unconscious conjunction of terms into a set of well-regulated, conscious alternatives. It also raises the whole question of an even more archaic past, an *archē* that would precede clearly defined oppositions and so, perhaps, philosophy itself and the ontotheological notion of sovereignty that would be coextensive with it.

What all these analyses and examples attempt to demonstrate is that the seemingly sovereign, deciding subject never really decides anything. At the end of the Fifth Session, Derrida puts this in the most economical terms possible: "An 'I' itself never decides anything. Precisely because it can."[26] This can be heard in several different ways, all of which come down to the same. On the one hand, insofar as a true decision, a genuine decision, always requires a break with everything that is programmed and calculable, with everything that would neutralize the event, that is, with everything that is possible for a putatively sovereign subject, then every time a so-called subject decides among already given possibilities, every time it decides by deploying some capacity that is supposedly its own, it makes no true decision at all. Hence the I never decides anything precisely because it can. On the other hand, insofar as decisions are indeed made, and made every day, insofar as *events of decision*, so to speak, come to pass all the time, then this must mean that what is other to the I, that the other in general, is already inside the I, and that it is always this other, this other that has no such powers or possibilities, who decides. Decisions are thus made only by that which—or the one who—has no power to make them. Only that which cannot decide decides, and that which can decide never does because it can. In a word, in a formula, it is always the other who decides.

In *Psychoanalysis Searches the States of Its Soul*, a text dated July 16, 2000, that is, in the summer between the two years of the Death Penalty Seminars, Derrida develops even further this logic of a decision that does not depend in any way on *my* powers or capacities. He there speaks, for example, of a performative that would be "beyond any theoretical knowledge, and thus any constative, but also beyond any power, in particular the

power of any performative institution," a performative that thus "defies the *economy* of the possible and power, of the 'I can,' 'I may.'"[27] It is psychoanalysis, Derrida goes on to argue, that today must think this relationship between the economy of the possible, a certain drive to mastery, and cruelty, and it will be psychoanalysis that will perhaps allow us to speak someday of "an unconditional without sovereignty, and thus without cruelty."[28]

All Derrida's analyses in the Death Penalty Seminars, as in "Force of Law," *Rogues*, and elsewhere, aim at nothing other than the very origin of sovereignty itself, the entire system or superstructure of sovereignty. This is made explicit in a passage where Derrida argues, after evoking without simply endorsing the Kantian notion of a sign, a sign of human progress, that what is happening today to the death penalty forms a system with what is happening to sovereignty in general.[29] It is, Derrida suggests, by system that sovereignty in all its forms—the sovereignty of the self, of the nation-state, and of God—is being called into question at the same time that the worldwide abolition of the death penalty, at least as it is currently understood and encoded by law, seems to be on the horizon. That is why the discourse of psychoanalysis is, for Derrida, such a privileged site for thinking the question of the death penalty, the question of the sovereignty of the state over the life and death of its citizens, but also the question of the sovereignty of a supposedly autonomous subject. And that is why Derrida seems to be compelled, driven—and more and more so as the seminar progresses—to turn to Freud.

If Freud is mentioned only twice in the first year of the Death Penalty Seminars, his appearance nonetheless sets up the second year of the seminar and determines much of its ultimate trajectory. After being simply invoked, in the same breath as Nietzsche, as someone who might have discerned a hidden interest behind the passion of the abolitionists, Freud is treated at some length because of his analyses of cruelty, sadism, and masochism (in *Three Essays on the Theory of Sexuality*, *Beyond the Pleasure Principle*, and "The Economic Problem of Masochism").[30] It is the question of cruelty, cruelty in relation to power and mastery, that initially drives Derrida back to Freud, and back to some of his earlier work on Freud. Derrida thus recalls during the Sixth Session of the first year Freud's emphasis on "the drive to dominate (domination, *Bemächtigung*, *Bewältigung*)," and he reminds us of his own "great insistence [on this] in 'To Speculate—on "Freud"' in *The Post Card*."[31]

In the second year of the seminar, however, the question of psychoanalysis, which has been on the periphery throughout the preceding year, becomes absolutely central, in part because psychoanalysis will have been

critical to our contemporary rethinking not just of cruelty and domination but of the very nature and origins of punishment and, a fortiori, of the death penalty. In the first session of the seminar, Derrida recalls a claim he made during the Estates General of Psychoanalysis the summer before, and he offers this clarification or correction:

> When I cautiously suggested, during a conference at the Estates General of Psychoanalysis (see "Psychoanalysis Searches the States of Its Soul"), that there was not, to my knowledge, a text by Freud expressly devoted to the death penalty, this did not exclude the possibility that Freud, without himself writing on this subject, might have charged someone else to do so in his name and in his place, thereby giving rise to a text whose status, language, logic, or rhetoric, whose signature in truth, in short whose gesture, act, pragmatics must be analyzed with great care, as we will try to do here shortly.[32]

Derrida is here alluding to the fact while Freud himself, Freud in his own name, never addressed directly the question of the death penalty in his work, Theodor Reik, his disciple or his surrogate, most certainly and emphatically did. He did so in 1926, in response to a survey sent to many leading intellectuals and writers, including Freud, regarding the death penalty. Reik's response (that is, his response for Freud) was initially published separately along with the other responses but was then included as an appendix to an expanded 1959 edition of Reik's 1925 work *The Compulsion to Confess*, a text that is not only antideath penalty but anti-penal institution insofar as it proposes replacing criminal punishment, what Kant calls *poena forensic*, with various forms of psychotherapy. Reik concludes his preface to the 1959 edition by recalling the circumstances of that survey and by making it clear that his response, the response of the disciple, met with the approval of Freud, the master:

> The last contribution [to the volume] is a paper on capital punishment from a symposium published and edited by the judge of a German High Court. This well-known official asked Thomas Mann, Jacob Wassermann, Freud and many other prominent personalities about their views on capital punishment and published their answers to his questions in a booklet, *Für und wider die Todesstrafe*. Freud asked me to answer in his place and discussed with me the kind of contribution that psychoanalysis can make to the solution of this important problem. It is, as far as I know, the only expression of Freud's view on this subject.[33]

Derrida thus turns to Reik in the second year of the Death Penalty Seminars because of his original reinterpretation of punishment and, more specifically, because of the way he uses Freud to argue against the death penalty. For Reik begins his response by recalling what Derrida calls "the fundamental scene of totemism," the story Freud tells of the origin of law in *Totem and Taboo*: "Crime was originally violation of a taboo. The law of taboo, the oldest of the world, was based upon the principle of the talion: an eye for an eye, a tooth for a tooth." That is how this son or this disciple who Reik is responds in 1926 for or in the name of the father. He responds by rearticulating the basic thesis of the father in *Totem and Taboo*—that is, in the text where Freud gives us what is arguably his most original interpretation of the very origins of law and punishment and, therefore, of sovereignty itself. It is to this interpretation, then, that Derrida too will be driven in his analysis of law, the death penalty, and sovereignty—that is, in his attempt to think what exceeds sovereign power, or at least what exceeds the ontotheological figure of sovereignty.

According to Freud in *Totem and Taboo*, the origins of talionic law are to be found in the originary murder of an Ur-Father and the eventual replacement of that father by a totem animal. The ambivalence that the sons or brothers who participated in the originary murder had for their father—at once hatred and love, rejection and identification—was thus transferred to the totem animal.[34] As Freud argues, psychoanalysis has shown us that "the totem animal is in reality a substitute for the father," and "the ambivalent emotional attitude, which to this day characterizes the father-complex in our children and which often persists into adult life, seems to extend to the totem animal in its capacity as substitute for the father."[35] At a later stage, a sense of guilt over this murder led to a prohibition against killing the totem animal, now substituting for the father, and eventually to a prohibition against fratricide and murder more generally.[36] The originary murder of the Father would thus be at the origin of law itself, not simply as an archaic past that has been definitively overcome and forgotten but as a past that still haunts and, in many ways, still determines our present, including our theories of punishment and our justification of the death penalty.

Trying to account for the various stages of patriarchy and religion, Freud goes on in *Totem and Taboo* to argue that the sacrifice of the totem animal eventually became an offering to God himself, who is in the end "nothing other than an exalted father."[37] It is at this point, Freud claims, that we bear witness to "the most extreme denial of the great crime which was the beginning of society and of the sense of guilt," as the "earlier

father-surrogate [is] abandoned in favor of the concept of God."[38] Finally, Freud is able to explain the origins of Christianity, suggesting that in "the Christian myth the original sin was one against God the father" and that the self-sacrifice of Christ is atonement for that original murder, an atonement—a life for a life—that is in accordance with talionic law.[39] All this helps explain, according to Freud, how, in Christianity, "a son-religion displaced the father religion" and how the feast in which the father is consumed, the totem meal, became a communion of the son—that is, the Christian Eucharist.[40]

Now this entire story of the murder of the Ur-Father by a horde of sons or brothers and the eventual atonement for this by means of a prohibition against murder and the self-sacrifice of a son is clearly in the background of Derrida's turn to Freud and Reik, as father and son, master and disciple, in this second year of the Death Penalty Seminars. It is, moreover, this story that will lead Derrida, during the Fifth Session, to consider a kind of preontotheological notion of sovereignty in the murder of an Ur-Father, a father who would seem to precede the Christian God and, thus, a certain ontotheological conception of sovereignty, one that is reminiscent, as I have been suggesting from the outset, of what Derrida would say in relation to Heidegger some two years later.

Derrida comes to this Ur-Father of *Totem and Taboo* not by reading this text, which he has read elsewhere, directly but by recalling a text written by Freud for or about his disciple, Reik. For if Reik in 1926 speaks for or in the name of Freud in the survey regarding the death penalty, Freud speaks in 1919 for, or so as to endorse, Reik in the preface he wrote to Reik's *Probleme der Religionspsychologie*. Derrida cites this preface at some length in the seminar, this preface where the father or master is endorsing the work of the son or the disciple in the context of a discussion where the central issue is none other than the relationship between fathers and sons and, thus, the question of the sovereignty of the father.

Freud begins his preface to Reik's book of 1919 by recalling many of the arguments of his own *Totem and Taboo* of 1913, starting with, as Freud puts it, this "unexpected conclusion," which Derrida cites and then interrupts almost just as soon: "God the Father once walked upon earth in bodily form and exercised his sovereignty as chieftain of the primal horde . . ." It is right at this point—just a line or so into the quote—that Derrida interrupts Freud, who is, recall, prefacing Reik, in order to comment on what Freud is arguing. What we get, in brackets, is one of Derrida's most adventurous reflections on the nature of sovereignty itself, the thought of a father who would be at once theological or ontotheological and yet, as the

origin of all ontotheology, even more archaic and primitive than all ontotheology. Derrida comments:

> [Before going any further in my quotation, I note the following, in brackets: so sovereignty is theological here but also a primitive, theo-anthropomorphic form of paternal power, the father being the primitive sovereign, the absolute primitive power, whether he is called God or, in the anthropomorphic figure that he gives himself, human father, the name father being in some way more primitive in this primal horde than any possible primitive distinction between man and God. Before man and God, before God and before man, there is, there will have been, there was the Father. It hardly matters, Father is God or Man, he is father before being God or Man (a secondary difference, in the end), and the sovereignty and the absolute power that the Father enjoys, that he is assumed to enjoy, a sovereignty without which we could understand nothing of the death penalty, of murder and the death penalty, of talionic law, this sovereignty implies not only that we go back to the Father, that is to say, earlier than and before the God/Man distinction but also to the Exception of the Father (a cruel exception since the father has all the powers of life and death, all the women, etc.) until . . .][41]

Let me, in turn, interrupt Derrida's interruption of Freud at this point to note Derrida's emphasis on the Father as Exception, a Father who does not just decide on the exception in some sovereign or hyper-sovereign manner but who is so exceptional that he exceeds every category and every chronology. This Father is so exceptional—at once originating and grounding the three forms of sovereignty we looked at earlier, those of the self, the state, and God—that the only way he can begin to exercise his sovereignty, the only way he can be recognized as sovereign, the only way he can begin to rule over his sons, is for him to begin to have his sovereignty compromised, shared, or shared out. That is, in order for his sovereignty to be shared out or even recognized, he must, as Derrida will go on to say, sacrifice that sovereignty through a kind of suicide, indeed, though Derrida does not use the term here, through a kind of autoimmunity. To continue Derrida's bracket in the midst of his quotation of Freud:

> [. . . earlier than and before the God/Man distinction but also to the Exception of the Father (a cruel exception since the father has all the powers of life and death, all the women, etc.) until the inevitable murder of the Father—by the Father, I would say, by a suicidal Father (Freud doesn't say this, at least not like this, and this is an important

> difference that I connect with what we were saying of the becoming auto-punishment or suicide of hetero-punishment), the murder of the Father by this multiple of the Father that this other virtual father is . . . a son who, as a multiple of the Father, a disseminated Father, can be, in actuality or virtually [*en acte ou virtuellement*], only a multiple son, sons, thus brothers . . .][42]

There would be much to say here about the way in which the exceptional sovereignty of the Father is at once compromised, deconstructed, and multiplied, in the sovereignty of sons who are also, in turn, virtual fathers. But rather than follow that path, let me continue to cite Derrida, who, carried along by the force of this thought of an exceptional sovereignty located in this Father as exception, will go on to speak once again of a beyond of ontotheological sovereignty.

> [But before closing this parenthesis or these brackets inside the interrupted Freud quote, let me ask you this: is sovereignty in general, the position of absolute power, as power over life and death, of the "I can watch over, give or suspend, give or take" the life of the other just as "I can with the law, that is, just as I can give, make or suspend the law," is this form of exceptional sovereignty, which is a force of sovereignty, not an earlier form (older, as it were, more archaic, in fact the archaic itself, the *arkhē*, commencement and commandment), absolute anteriority, absolute antiquity, the absolute archaicity that precedes both life and death, and law, and above all the oppositional distinctions between legal and illegal, nature and law, nature and right, *physis* and *nomos*, thus also between *poena naturalis* and *poena forensis*, but also, like the Father himself, between God and man (we have just heard Freud on this subject), and I would add between God, Man, and the Animal; and the place of the totem in the Freudian etiology of democratic morality, of equality or equity following from the murder of the primitive Father (*Urvater*) by the brothers, his sons, this place and this figure of the animal totem confirms that the primitive Father is *at once*, once and for all, and is *neither nor*, neither God, nor Man, nor Beast [*Bête*]. The Father is at once and he is neither God-Man-Beast. . . . The Father is the Living Being in general (God-Man-Beast) but this Living Being in general, once it is above the Life/Death distinction, is doomed to death, to be killed by the very thing to which, to whom, it gives life; it is God-Man-Animal Living-Death. Good and Evil. Origin of Good and Evil, therefore before the opposition of Good and Evil. All of this, if I may venture, in one and the same stroke [*coup*].][43]

It is a truly extraordinary interruption, an absolutely exceptional rephrasing and rethinking of Freud's own rephrasing and rethinking of the fundamental theses of *Totem and Taboo* in his preface to Reik's book. Derrida will go on to draw several consequences from this passage, all of which are important and would merit long developments, but most interesting for our purposes here is the question of sovereignty that is so central to the seminar and, as I have been arguing, to so much of Derrida's work.[44] As Derrida goes on to argue, what the murder "of the primitive Father or God who is both good and bad as almighty sovereign" indicates, what the murder of the Ur-Father by the primal horde and the institution of the first "moral restrictions," and especially the prohibition against murder, indicates, is that "the origin of morality can only be immoral or rather a-moral, just as the origin of law can only be a-legal, just as any grounding can only be 'without ground,' that is to say, abyssal, unjustifiable, like paternity itself or like the murder of the father."[45] Derrida thus recalls here what he argues, in not unrelated contexts, in "Force of Law" and elsewhere: The origin of the law is always in excess of the law; that which grounds sovereign power cannot itself be sovereign in the same way as that which it grounds. Hence Derrida, reading Freud's preface to Reik's book on psychology and religion, speaks of a notion of sovereignty and of the Father that would come even before the distinction between man and God, a notion of sovereignty that would appear to be *pre*-ontotheological. By speaking of an "absolute archaicity that precedes both life and death, and law, and above all the oppositional distinctions between legal and illegal, nature and right, *physis* and *nomos*," an archē that would precede physis as mere nature, physis as opposed to nomos, Derrida is evoking a principle of "sovereignty" that would precede all fathers and all sons, all determinations of the father and the son, not unlike Heraclitus's *polemos*, who, as the father of all things, determines who is father and who is son, who is master and who is slave.[46] That is what authorizes Derrida to say, at once breaking the law of noncontradiction and mixing categories in a way that no philosophy and no law would ever allow, "the Father is at once and is neither God-Man-Beast," "the Living Being in general (God-Man-Beast)," a Father "before the opposition of Good and Evil," in short, an ambivalent Father.[47]

We have gone rather far back behind an ontotheological notion of sovereignty that would distinguish between God, man, and beast and would establish a strict hierarchy between these three things, these three levels of being. We have gone back well before Kant who placed in the sovereign a right to punish and even to put others to death, Kant who understood the death penalty as the very justification of law, and who saw the death penalty

as that which gives dignity to man and elevates the human above the animal. We have gone rather far back, indeed, as far back as anyone can go, back to an originary physis or even an originary difference, an originary violence that would be sovereign over all but with a sovereignty that is not derived from ontotheology since it precedes the distinctions man-God, physis-nomos.

Now it is in very similar terms—and this is surely no coincidence—that Derrida, two years later, in his final seminar, characterizes Heidegger's notion of *Walten* in his 1929–1930 seminar and in works such at *An Introduction to Metaphysics*. Derrida asks himself at one point whether Heidegger's thinking of *Walten* suggests that we are already "in the opposition of *nomos*, *tekhnē*, *thesis* to *physis* in the late and derived sense, or else in that différance (with an *a*) of originary *physis*, which takes the forms of law, thesis, technique, right, etc."[48] Elsewhere, he suggests that *Walten* "signifies not something or someone, neither man nor God, but the exercise of an archi-originary force, of a power, a violence, before any physical, psychic, theological, political determination," "before any ontic or ontological determination."[49] "Foreign or heterogeneous, excessive even, with respect to this ontic and therefore theological or theologico-political sovereignty," *Walten* would thus be, says Derrida, "an ontological super-sovereignty, at the source of the ontological difference."[50] Originary physis or différance, Derrida even relates Heideggerian *Walten* to the Freudian notion of *Trieb*:

> On the one hand, *Trieb*, the drive, also designates in German pushing up, in the sense of what grows, of the growing (*phuein*) of *physis*, primarily in the vegetable sense, but also in the sense of the growth of what is born, the offspring, the bud, the child, etc. And so to speak of everything that is, of that totality of entities as *physis* in general . . . before any other distinction between nature and its others, between the vegetable and its others, is to speak of what *is* in general, and therefore of the world . . . a force the sense of which remains absolute, and thus indeterminate, as much a psychic, symbolic, spiritual, etc. force as a physical or corporeal force.[51]

Physis, *différance*, *Trieb*, Heideggerian *Walten* . . . all these seem to be in the background, pushing up, as it were, into Derrida's description of the Ur-Father in Freud. Just as Derrida, in the second year of the Beast and the Sovereign Seminars, will develop, by passing through Freud, a preontotheological, pretheologico-political notion of sovereignty under the name of Heideggerian *Walten*, he develops here, in the second year of the Death Penalty Seminars, by passing through—or at least by letting be heard—

Heidegger, a preontotheological, pretheologico-political figure of sovereignty under the name of the Freudian Ur-Father. In the end, this should probably not be so surprising. It should not be so surprising that Derrida would develop this notion of an Ur-Father by calling or summoning together these two fathers or grandfathers, Freud and Heidegger. As Derrida writes in *The Post Card* and then recalls, repeats, recites, in the final footnote to *Specters of Marx*: "Freud and Heidegger, I conjoin them within me like the two great ghosts of the 'great epoch.' The two surviving grandfathers. They did not know each other, but according to me they form a couple, and in fact just because of that, this singular anachrony."[52]

Two *surviving* grandfathers, writes Derrida, who form a singular *anachrony*: But this surviving in anachrony would also be, it seems, the very "power" of sovereignty, or else that which precedes and exceeds all sovereignty and so can never be assured by any sovereign power. For sovereignty can exercise and affirm itself only anachronistically, as it were, in a time that is not contemporaneous with itself and so is not its own. As Derrida suggests near the end of the passage from the second year of the Death Penalty Seminars that we have been considering on Freud's 1919 preface to Reik's *Probleme der Religionspsychologie*: "It is sovereignty that puts time 'out of joint' and compromises the very succession that it promises."[53] To affirm this—which means, as always, to affirm it in another time and, in the end, always as another—is to begin to erode the phantasm of sovereignty that still today sustains the death penalty.

NOTES

1. Jacques Derrida, *The Death Penalty*, vol. 2, trans. Elizabeth Rottenberg (Chicago: University of Chicago Press, 2017), 244.

2. Jacques Derrida, *The Beast and the Sovereign*, vol. 1, trans. Geoffrey Bennington (Chicago: University of Chicago Press, 2011), xiii.

3. Heidegger is mentioned in several places during this first year of the seminar (particularly with regard to the human "capacity" to "die" and not just "perish"), as is the principle of reason, but neither he nor it are treated in any depth or detail (see Jacques Derrida, *The Death Penalty*, vol. 1, trans. Peggy Kamuf [Chicago: University of Chicago Press, 2014], 99, 225, 237–39, 245, 250).

4. Derrida, *Death Penalty*, 2:1.

5. Ibid., 21, 17, 88, 24. Derrida reminds us that there are, especially today, certain constraints upon these powers, international organizations and law as well as public opinion, that presidents (or governors) need to consider to be re-elected (ibid., 52, 57). Derrida's many references to Bush, as well as

his later reading of a letter from an American professor from New Jersey on the death penalty, show that the American example—tied always to the question of religion—is never very far from his mind.

6. Ibid., 87.
7. Ibid., 1–2.
8. Ibid., 2.
9. Ibid.
10. Derrida, *Death Penalty*, 1:169; emphasis added.
11. Derrida, *Death Penalty*, 2:2, 3.
12. Ibid., 134; emphasis added.
13. Ibid., 9.
14. Ibid., 13.
15. Ibid., 110.
16. Ibid.
17. Jacques Derrida, *For What Tomorrow . . . : A Dialogue*, interview with Elisabeth Roudinesco, trans. Jeff Fort (Stanford, Calif.: Stanford University Press, 2004), 170.
18. Ibid., 5.
19. Ibid., 6. We might compare this odd rhetorical moment to the equally odd one in the second year of the Beast and the Sovereign Seminar when Derrida speaks of the seemingly sovereign choice that a large and growing number of people have in the Western world between two ways of having their bodies disposed of—namely, burial or cremation. In both cases, Derrida presents what is never a *choice* for a sovereign subject in terms of a putative choice—a merely putative choice for a putatively sovereign subject. And in both cases Derrida presents the choice as binary, either natural death (whether by accident or disease) or the death penalty, in the one case, burial or cremation, in the other. In order to make the decision binary, Derrida thus has to exclude all other ways of disposing of the body, just as he groups very different ways of dying besides the death penalty (automobile accident and disease) into the category of "natural" death.
20. This will also not be unrelated to the supposed "decision" of suicide, an impossible decision, for Derrida, since every decision implies an "I can" that projects a future in which the sovereign subject is present—whether as dead or alive. Derrida, *Death Penalty*, 2:4, 15, 83.
21. Ibid., 69.
22. Ibid., 25.
23. Ibid., 40.
24. Ibid., 32.
25. Ibid., 45.
26. Ibid., 127.

27. Jacques Derrida, "Psychoanalysis Searches the States of Its Soul: The Impossible Beyond of a Sovereign Cruelty," trans. Peggy Kamuf, in *Without Alibi*, ed. Peggy Kamuf (Stanford, Calif.: Stanford University Press, 2002), 275.

28. Ibid., 276.

29. Derrida, *Death Penalty*, 2:89.

30. Derrida, *Death Penalty*, 1:132, 159–62. The name of Reik does not even appear in the first year of the seminar.

31. Ibid., 159–60.

32. Derrida, *Death Penalty*, 2:8.

33. Theodor Reik, *The Compulsion to Confess: On the Psychoanalysis of Crime and Punishment* (New York: John Wiley and Sons, 1959), xi–xii. The appendix itself begins on 473.

34. Sigmund Freud, *Totem and Taboo*, trans. James Strachey (New York: W. W. Norton & Company, 1950), 143.

35. Ibid., 141.

36. Ibid., 146.

37. Ibid., 147.

38. Ibid., 150.

39. Ibid., 156.

40. Ibid., 154.

41. Derrida, *Death Penalty*, 2:113–14.

42. Ibid., Fifth Session, 114.

43. Ibid., 114–15.

44. Derrida goes on to make three points with regard to this passage: 1) Freud's argument seems to suggest that all religions have the same origins in totemism, indeed that "every religion descends, like a single man, from the same monkey, as it were. . . . And in a certain way, because the father is One, they are all structurally monotheistic"; 2) the murder of the father must be constantly repeated, shared, and multiplied. In other words, "what takes place once and for all is endlessly repeated and reproduced. The Father, the God, the Man, the Beast is singularly indestructible [*increvable*]. Here is an event that takes place once and for all, from the origin, from the *arkhē*, but the *arkhē* (beginning-commandment) survives and what took place long ago is still taking place today and will continue to take place tomorrow"; 3) by suggesting that all religions are not only sacrificial but expiatory, "forgiveness-seeking," Freud, according to Derrida, would seem to be granting an exemplary status to Christianity, a theme that Derrida himself took up in his previous seminar on perjury and pardon (*Death Penalty*, 2:117). In this same passage, Derrida also refers us to his earlier treatment of Freud's *Totem and Taboo* in "Before the Law," trans. Avital Ronell and Christine Roulston, in

Acts of Literature, ed. Derek Attridge (London: Routledge, 1992), 181–220. But *Totem and Taboo* has, of course, been important to Derrida ever since at least *Glas*, trans. John P. Leavey Jr. and Richard Rand (Lincoln: University of Nebraska Press, 1986), 216a).

45. Derrida, *Death Penalty*, 2:115.
46. Ibid., 114.
47. Ibid., 115.
48. Derrida, *Beast and the Sovereign*, 2:126.
49. Ibid., 103–4; see 94n2.
50. Ibid., 208.
51. Ibid., 103–4.
52. Jacques Derrida, *Specters of Marx*, trans. Peggy Kamuf (New York: Routledge, 1994), 196n39. Derrida is here citing Jacques Derrida, *The Post Card*, trans. Alan Bass (Chicago: University of Chicago Press, 1987), 191.
53. Derrida, *Death Penalty*, 2:117.

CHAPTER 4

The Death Penalty and Its Exceptions

Christina Howells

"When the President does it, that means it is not illegal."

—RICHARD NIXON, interview with David Frost, 1977

"Even when the death penalty is abolished, it will survive."

—JACQUES DERRIDA, *La Peine de Mort*

In this essay, I shall be reading volume 1 of Derrida's *La Peine de Mort* (2012) in conjunction with *Force de Loi* (1994), *Politiques de l'amitié* (1994), and *Voyous* (2003). My focus will be primarily on volume 1 where the considerations I wish to analyze are laid out. Derrida's purpose in the Death Penalty Seminars making up this volume is to deconstruct the various discourses for and against the death penalty, to uncover why there has been, in his view, no properly philosophical argument against capital punishment, and ultimately, perhaps, to construct such an argument himself. As the blurb to Peggy Kamuf's English translation contends: "In this newest installment of . . . Jacques Derrida's seminars [he] . . . attempts one of his most ambitious goals: the first truly philosophical argument against the death penalty."[1]

Derrida's own account of his purpose in the seminars is slightly different and would seem to be the precondition for constructing an abolitionist argument. In a footnote to the Tenth Session he explains: "The impossible task of this seminar is this: to break this alliance, this symmetry between abolitionism and anti-abolitionism where finally each of them needs the other."[2]

I shall return to this question later and to Derrida's contention that the so-called alliance engenders a particularly intractable form of philosophical double-bind, closely related to religious belief and, in particular, to the many paradoxes of Christianity.[3]

My primary preoccupation in this essay will be with Derrida's analysis of one aspect of this "alliance," that is the role of the exception in debates about the death penalty: exceptions to the main thrust of their argument, acknowledged both by abolitionists and by supporters of capital punishment. As well as discussing the implications of these exceptions for debate about the death penalty itself, my focus will also be on the light that the death penalty can throw on the nature of the exception. Is the death penalty an example of what is implied by law and justice, is it an exception to law and justice, or is it actually paradigmatic of law and justice? I have said law *and* justice, but I shall look first rather at law *or* justice.

In *Force de loi*, initially given as a paper entitled "Deconstruction and the Possibility of Justice" at the Cardozo Law School in 1989, Derrida distinguishes between law, which he maintains can be deconstructed, and justice, which cannot. Indeed, he claims that justice is deconstruction, or "the possibility of deconstruction," and that deconstruction is justice.[4] But of course, like all binary oppositions, the distinction between law and justice is far from watertight, not what Derrida calls "une vraie distinction": On the contrary, although law and justice are not identical, they are interdependent.[5] Law necessarily deals with the general whereas justice is singular, and Derrida will compare justice to Levinasian *sainteté*, holiness, in its recognition of the uniqueness of the Other; but nonetheless, law aims to approach the condition of justice, and justice needs to be instantiated in law if it is to be enacted.[6] However, unlike justice, but like the nation-states that it helps to control, law is always originally founded by force, as the English expression "to enforce the law" makes clear.[7] And in *Force de loi*, Derrida already begins to explore the arguments of Kant and Pascal, among others, to show that the "force" or violence on which the law ultimately depends cannot be definitively distinguished from the "force" or violence that it is intended to prevent and punish. Kant's categorical imperative cannot, he contends, be used as an argument against violence, of either the State or the individual.[8] The law is, in itself, ungrounded, neither legal nor illegal; the origin of its authority lies outside the law, before the law in the sense of prior to the law.[9] And if law is founded by force, it is also held in being by the threat of force and, ultimately, of death.[10] This is why the death penalty can never be a punishment among others; it is rather the paradigm of punishment, the ultimate sanction for

transgression. It is the hidden card that the sovereign always holds up his sleeve, which will trump any argument. In an interview with Élisabeth Roudinesco, Derrida describes it as "a condition of possibility of the law" and as "the quasi-transcendental condition of penal law and of law in general."[11] Although some theorists, like Kant, envisage capital punishment itself as a kind of categorical imperative according to the so-called *lex talionis* (an eye for an eye, a tooth for a tooth), in Derrida's view it is a punishment that can never "fit the crime," even (or perhaps especially) in cases of murder.[12] We will come back to Kant but should note at this stage that the law of talion is (mis)represented when it is understood in terms of cruel revenge. It is of course true that Christ proposed replacing it with a nonvengeful response, that of turning the other cheek. But in Jewish law, as Derrida points out, talion originally represented a curb on vengeance and retaliation: *no more*, then, than an eye for an eye—the alternative could lead to potentially catastrophic escalation.[13] In volume 2, Derrida further criticizes Reik's insistence on the uniquely *pulsionnel* aspect of the law of talion and reiterates the antiutilitarian basis of Kant's position.[14]

We cannot explore all these issues in the present essay, but it is already clear that the death penalty has a very special—indeed, unique—status socially, ethically, and legally. This is why abolition of the death penalty is never simply a matter of removing cruelty or an anomaly. Its abolition would arguably remove the very foundation of law, or, more accurately, it would reveal that the law is without foundation.[15] Even if it is never applied in practice, the existence of the death penalty on the statutes underpins the law. It is not subject to rational debate: It can be ordered and canceled at will, or indeed at whim, at the whim of the sovereign. Moreover, as Nixon recognized so astutely, the sovereign must be "above" the law if he founds the law. He is necessarily outside the law. So when—and if—presidents pardon, when—and if—presidents commute death penalties, they do not weaken but rather manifest their power and authority. They have the gift of life and death. They are beyond the law and can pardon—or in most cases not pardon—at will.

The death penalty, then, is not one punishment among others. It is exceptional. It is one of the major implied exceptions (along with war and self-defense) to the commandment "Thou shalt not kill" and indeed to Article 3 of the Universal Declaration of Human Rights (1948), which states "Everyone has the right to life, liberty and security of person."[16] It is essential to the law. And abolitionist discourse recognizes this, at least at some level, when it allows exceptions to the case for abolition. Abolitionists rarely, if ever, demand total abolition, even when they claim, in their

headline manifestos, to do so. This is why Derrida calls their discourse hypocritical.[17] Abolitionists call for the abolition of the death penalty—*except* for murder, or *except* for mass murder, or *except* for the murder of a police officer, or *except* for terrorists, or traitors, or those who threaten the State. The death penalty has to be maintained to keep the law in place, to keep the state in place, to keep the sovereign in power. This, Derrida argues, is why international decrees and principles concerning the death penalty never require its abolition, they merely advise it.[18] A matter of best practice, as it were. To require its abolition would be to undermine the sovereignty of the state not just by failing to recognize its autonomy as a law-giving body but also by removing its very foundations, which are underpinned by the threat of death.

Similarly, those who defend the death penalty also recognize exceptions: exceptions such as children under eighteen, pregnant women, people with cognitive disabilities. What is the reason for these exceptions? If a crime deserving of the death penalty has been committed, are we not equal before the law? The answer is clear if we examine the exceptions—they all put in question the matter of responsibility. The pregnant woman's unborn baby is clearly not responsible for the crime she committed, and the same argument can be proffered for minors and for those with cognitive or developmental disabilities.

So far, so good. But of course Derrida could not be expected to stop at the banal and predictable level of explaining the nature of, and reasons for, the exceptions to both pro- and antiabolitionist arguments. It is precisely these exceptions that, we shall see, far from being in fact exceptional, are rather paradigmatic of the necessary, hidden, unacknowledged, and unwelcome truth of the discourses in which they are to be found. The truth then, of abolitionist discourse, is that it cannot bring itself to call for total abolition. Even when total abolition is called for, it is swiftly followed by a list, short or long, of exceptions: when someone is a continuing threat to society, for example, or a threat to the state. Even when the most fervent abolitionist recognizes the need to maintain the law, she does not (usually) aim to undermine or destroy the state and its authority. Similarly, those who would retain the death penalty, except in cases of diminished responsibility, are probably unaware that they have already opened the stable gate and allowed the horses to bolt, opened the prison cells and allowed those awaiting execution to leave death row. Arthur Koestler is a major figure in this respect: In his *Reflections on Hanging* of 1957, the issue of responsibility constitutes his primary philosophical objection to capital punishment.[19] For how can anyone seriously contend that we are ever fully responsible

for our acts?[20] Such responsibility would imply standards of identity, understanding, free will, and autonomy that are clearly beyond all of us, and even more clearly beyond those who find themselves behind bars for killing a stranger, family member, or loved one, be it for financial gain, from hatred, for extremist religious reasons, or simply as part of a robbery. In a sense, mental capacity and diminished responsibility might not even come into play: It could be assumed in all cases of murder, perhaps for once *without exception*.

So the abolitionist position is undermined by the need to maintain social order, and the pro–death penalty position is undermined by the awareness (however repressed) that no one is ever fully responsible for their actions. The death penalty is arguably a matter of maintaining order and authority, not of justice, and its enactment can never be justified except as a means of social control. The death penalty is flawed not so much by its complexities, difficulties, horrors, and many exceptions; it is flawed at its heart, it is intrinsically unjust, a matter of law, not of justice. It is what enables the law to operate, at the same time as being what reveals the fatal flaws of all law and authority. But we have seen Derrida question the law/justice distinction not because it can be elided—on the contrary—but because its recognition must also entail recognition of the intimate interdependence of the two concepts. Law and justice are distinct but also inextricably linked.[21] Justice requires its instantiation in law; law requires that it come as close as possible to justice. Law can never be just, but justice must be its impossible and necessary aim and ultimate purpose.

Why then, Derrida asks, has there never been any properly philosophical argument against the death penalty whereas there have been many arguments proposed in its favor, by philosophers from Plato to Hegel and from Rousseau to Kant?[22] Why is it so persistently impervious to rigorous analysis, so resistant to clarity of thought? The death penalty, he suggests, is ultimately not an issue susceptible to logical analysis: As a matter of life and death it lies beyond reason, arguably at the heart of what it is to be human. It is thus subject to all the same questions as those concerning mortality: How does our relationship to death affect—indeed, even constitute—the nature of our humanity, that is to say our finitude? And furthermore, how is our humanity affected by our acceptance of the death penalty as a possible punishment for crime even today in certain "civilized" and Christian countries? As Derrida writes of the guillotine: "So I repeat my question: what must man be, what is proper to man, the right of man proper to what is proper to man, the history of the right of man proper to what is proper to man, for this machine not only not to be the instrument

of what has been called for fifty years a crime against humanity but to be interpreted as a machine that serves the dignity of man?"[23]

In fact, Derrida contends, there is in his view "an essential *collusion* between philosophy as such and the death penalty" in so far as the *propre de l'homme* (the specificity of the human), the "dignity of man," and what distinguishes him from nonrational animals is identified with his ability to transcend his own life. If this willingness to risk one's life for something higher is what specifies the human, what makes man an end rather than a means, what marks us out as not merely part of nature, then the attitude of philosophers, and a fortiori of Christians, to death and the death penalty in particular is never going to be susceptible to easy resolution.[24] Indeed, Christianity is arguably the religion where views on the death penalty are inevitably most complex and even overdetermined, given its focus on forgiveness (both divine and human), and on the Incarnation and Passion of Christ, which Derrida refers to as "the humanisation of God."[25] In any case, "the death penalty is . . . like death itself, *le propre de l'homme* in the strict sense," and arguments both for and against it involve extremely high stakes since they are so intimately entwined with our conception of what it is to be human.[26] In his seminar, Derrida will endeavor to deconstruct the arguments of both pro- and antiabolitionists and thereby to reveal their underlying interdependence and complicity.

This complicity may initially seem surprising, or even implausible, for the terms of the debate themselves conspire to occlude the grounding principles and, in particular, to mask their essential solidarity.[27] Philosophically, the terms in which discussions of the death penalty have been posed up till now contain an inherent (humanist) bias that affects both proponents of capital punishment and abolitionists alike. Philosophers who enter the debate are inevitably hidebound by a failure of rigor (and perhaps also a failure of nerve) that will remain inescapable as long as it goes unrecognized: Discussion of the death penalty entails a kind of double-bind or aporia, the operation of which makes any consistent position impossible. Derrida's argument here is complex and perhaps unexpectedly psychoanalytic: What the death penalty provides us with, he maintains, is a semblance of protection from our own finitude by determining the hour of death for another human being and, by imaginative extension, for ourselves. The seduction and allure of any escape from finitude, however illusory, cannot be overestimated. Finitude and our awareness of it is, of course, what makes us human, but it is also the source of all our anxiety and fear of the future. The phantasm of an end to finitude provides as powerful a brake on philosophical reflection on the death pen-

alty as does our desire to protect and preserve the law that depends on it.[28] This "terrifying solidarity" between philosophy and the death penalty means, in its "infinite perversity" that a truly philosophical discussion is doomed to fail, and the debate will either be avoided entirely or else driven to take refuge in pragmatic political and ethical considerations.[29] Of course, this impasse may only be noticed by the very best of philosophers—the rest of us may not even realize that our discussions are falling short of philosophical standards of logic and consistency and are mired in our own complex attitudes to death. It would not be surprising if the fervent abolitionist Camus, for example, believed that his discussions of the death penalty were philosophical in the best possible sense, even if Derrida would beg to differ.[30]

Let us return now to the exception. Abolitionists, Derrida maintains, have not yet provided a properly philosophical argument against the death penalty. Conversely, however, Kant's arguments in favor of the death penalty seem initially promising in terms of their philosophical rigor, albeit on the wrong side of the debate. Kant's argument, put very briefly, is that the law of talion constitutes a kind of categorical imperative, "the categorical imperative of penal justice": Murder can only ever be responded to by an equivalent deprivation of life—nothing else could be of the same order of magnitude.[31] Any less stringent punishment would make the law complicit with murder itself. As so often, with Kant, the issue seems at first to be entirely black and white. But when we take a closer look we see that Kant himself feels compelled to allow two exceptions to his rule: the one, infanticide of an illegitimate baby, the other, death by dueling. Both concern honor, which is placed higher than life itself, and, in the case of the infanticide, there is the further (extraordinary!) argument that the baby's illegitimacy means that it is not afforded the usual protections the State grants to its citizens. Derrida comments on the uselessness and absurd logic of Kant's analysis. But in fact, Kant does not believe that these are really exceptions to the moral and philosophical arguments in favor of the death penalty. His reasoning may surprise us: He suggests, somewhat regretfully, that in its present, imperfect form, society is not able to carry through all the consequences of the ethical imperatives to which we should, ideally, be subject. The death penalty may be the correct punishment for both dueling and infanticide, but society is not yet in the ideal form that would make it appropriate to enforce this. It is not so much that we are not fully responsible for our actions but rather that society is not sufficiently evolved to make the categorical imperative of the death penalty universally applicable. This is Kant's unusually pragmatic compromise solution to what Derrida refers to as the double-bind in which he finds himself enmeshed.

But, much as we might (or might not) sympathize with Kant's dilemma—struggling with the consequences of his own moral rigor—and much as we might be wryly amused by his choice of exceptions, we will not be surprised to see him hoisted by his own petard, brought down by his own arguments rather than defeated by those of others. Indeed, in the "Explanatory Remarks" in his appendix, Kant attempts to deal with further tricky issues such as the appropriate punishment for rape (which would be, he maintains, castration) and bestiality (which would be expulsion from society). Kant seems to consider it self-evident that punishment in kind (i.e., raping the rapist) would be what he calls "a punishable crime against humanity," without considering that the same strictures might apply even more forcibly to capital punishment for murder. If even Kant is unable to maintain the full logical consequences of his own arguments, they are certainly doomed, in practice, if not in theory. Kant's exceptions to the death penalty and the *lex talionis* make him as vulnerable as anyone else, abolitionist or proponent of capital punishment, to the unraveling of his own apparently unassailable logic.

As Kierkegaard and Carl Schmitt already knew, it is the exception that reveals the true nature of the general rule. In Schmitt's terms, and he appeals to Kierkegaard for support, rules prove nothing and are without interest, whereas the exception proves and explains everything.[32] Speaking in terms of "exceptions" is a—possibly unwitting—attempt to mask or marginalize a fundamentally undermining truth or principle. Once we attend to the question of why these exceptions exist, it becomes clear that they, in fact, apply not just to a few particularly tricky cases but rather to all possible cases. It is, in fact, the exception that creates, demonstrates, exemplifies, and ultimately generates the rule. Like the textual contradictions to which deconstructive analysis draws attention, exceptions are never accidental; they rather expose a truth that has been concealed. Again, like impossible "unconditionals" such as forgiveness, or the gift, or democracy, exceptions represent what is essential and necessary yet intrinsically unachievable.[33] There is nothing contingent about the exception. Indeed, the exception participates in a similar logic to that of the supplement: The supplement is subject to an inherent ambiguity insofar as it hovers between the status of addition and completion, between being an inessential extra and an essential constituent. Ultimately, the supplement reveals a lack in what it is claimed to supplement. Similarly with the exception: What is presented as lying outside the rule is in fact also inside it; indeed, it is the condition of the rule, but an impossible condition, that is to say it reveals the impossibility of the rule itself. All attempts to theorize the exception

become embroiled in paradox: This is why there can never be a philosophy of the exception, despite the necessity to think it through coherently. "A *theory* of the exception, especially a juridical or political theory of the exception, is impossible as a *philosophical theory*, even if a *thinking* of the exception is necessary."[34]

Schmitt may have shown that it is the sovereign who "decides on the exception"—though as Derrida points out, we did not need to wait for Schmitt to know that—indeed, perhaps, as Agamben argues, in American and European politics and law, "the exception has become the rule"; but Derrida goes further than either in maintaining that it is the exception that decides the sovereign.[35] Similarly, he maintains, the decision itself is always exceptional and makes of me an exception.[36] Agamben and Schmitt are not talking specifically about the death penalty but rather about the bypassing of democratic legal systems and procedures in times of "emergency"—be this caused by war (1914, 1939), civil war (USA abolition of slavery: Lincoln), terrorism (9/11), threats to democracy itself (Algeria), or simply economic peril (Depression of 1920s). And of course, all these categories call out themselves for deconstruction: Who can distinguish between war and peace, civil war and social protest, terrorism and the fight for freedom? In all these cases, the sovereign, be s/he president, prime minister, or king, "takes the law into his own hands," so to speak, and thereby reveals, indeed unmasks, precisely in whose hands it ultimately resides. And Derrida points out how close Article 51 of the United Nations' Charter on the need for and permissibility of exceptional action for a country's self-defense ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence") comes to Article 48 of the German Constitution of 1919, discussed by Schmitt, which grants potentially unlimited power to the President of the Reich.[37] As Derrida phrases it, perpetual peace can only be imposed by force.[38] This is, of course, one of the many aporias of democracy. It is the possibility of the indefinite suspension of the law, the generalization of the "exception," that paradoxically guarantees both the law and democracy itself. Sovereignty always ultimately depends on an abuse of power.[39] In Benjamin's stronger terms, the law is *pourri*, corrupt, and a violence against nature.[40]

And the death penalty is paradigmatic of the abuse of power that is usually concealed by sovereignty. This is why its exceptions are so politically problematic. In a sense, once exceptions are recognized, the whole juridical system is put in jeopardy. The exceptions to the death penalty and the exceptions accepted by abolitionists all conspire to conceal the underlying truth of capital punishment either by mitigating its harshness or, conversely,

by accepting its necessity in certain circumstances. The death penalty is a use and abuse of power, sanctioned by the sovereign for reasons of social control. However much it may be legal, it is never just. It is abusive yet legally sanctioned. But what we cannot face up to is that it might still be just what we need and arguably even desire.[41] This, then, is why "Even when the death penalty is abolished, it will survive."[42] Its abolition is both necessary and impossible, as is so often the case once unconditional concepts are properly unpacked or deconstructed. Following the fortunes of the death penalty and of its parallel abolitionist discourse, Derrida has deconstructed the arguments for and against capital punishment and the law that depends on it; he has also forced us to recognize our complicity with the abuse that underpins apparently civilized society and sovereignty. Indeed, in a phrase that might be seen as the corollary of his claim that "deconstruction is justice," he also suggests that perhaps "deconstruction is always, ultimately . . . of the death penalty."[43] Furthermore, in a reversal that should not surprise us, he has simultaneously thrown an unexpected light on the nature of the exception itself: Like the supplement, the exception is never outside the rule, it lies rather at the heart of the rule, it is the paradigm of the truth of the rule. What the rule tries to exclude, or hide away as extraneous, is the unacknowledged key to its own illegitimacy or lack of foundation. The truth, then, always resides with the exception, never with the rule. Even, or perhaps especially, the death penalty is subject to this apparent paradox. And this, Derrida insists, is precisely the moment when we must take our decision: "[It is when both positions or oppositions] are equally possible and thus undecidable that decision and responsibility must be taken."[44]

Even if there can be no properly philosophical argument against the death penalty our responsibility is undiminished. The "impossible task" of the seminars remains an inescapable double-bind.[45]

NOTES

1. Jacques Derrida, *The Death Penalty*, vol. 1, trans. Peggy Kamuf (Chicago: University of Chicago Press, 2014).

2. Ibid., 259; for the corresponding entry in the original French edition, see Jacques Derrida, *La peine de mort*, vol. 1 (Paris: Galilée, 2012), 350.

3. Derrida, *Death Penalty*, 126, 137, 161, 182; *La peine de mort*, 183, 197, 229, 255.

4. Jacques Derrida, *Force de loi* (Paris: Galilée, 1994), 35, my translation.

5. Ibid., 14, 49, 79. Jacques Derrida, *Voyous* (Paris: Galilée, 2003), 208.

6. Derrida, *Force de loi*, 19, 49.

7. Ibid., 17.
8. Ibid., 99.
9. Ibid., 34.
10. Ibid., 18, 101.
11. Jacques Derrida, interview by Élisabeth Roudinesco, *De quoi demain . . . Dialogue* (Paris: Galilée, Fayard, 2001), 229, 235, my translation.
12. Immanuel Kant, *Metaphysics of Morals*, trans. Mary J. Gregor (Cambridge: Cambridge University Press, 1991), see section 2, "The Science of Right," "The Right of Punishing."
13. Cf. Derrida, *Death Penalty*, 141; *La peine de mort*, 203. See also Derrida, *De quoi demain*, 243.
14. Jacques Derrida, *The Death Penalty*, vol. 2, trans. Elizabeth Rottenberg (Chicago: University of Chicago Press, 2017), 62, 65, 247.
15. Derrida, *Force de loi*, 101.
16. Derrida, *Death Penalty*, 1:81, 99, 136; *La peine de mort*, 1:125, 150, 195.
17. Derrida, *Death Penalty*, 1:93; *La peine de mort*, 1:140.
18. Derrida, *De quoi demain*, 248.
19. Perhaps surprisingly, Derrida refers to Koestler only once in volume 1 of his seminar and then it is simply as an adjunct to Camus. See Derrida, *Death Penalty*, 1:227; *La peine de mort*, 1:309.
20. See Derrida, *Force de loi*, 50–51.
21. Derrida, *Voyous*, 208.
22. Derrida, *De quoi demain*, 236.
23. Derrida, *Death Penalty*, 1:193; *La peine de mort*, 1:268.
24. Derrida, *De quoi demain*, 237.
25. Derrida, *Death Penalty*, 1:244–45; *La peine de mort*, 1:333–34.
26. Derrida, *De quoi demain*, 239, my translation.
27. Ibid., 350.
28. Ibid., 348–50.
29. Ibid., 350, 349.
30. It is my sense that we have come here to a point where discussion of the Freudian death wish is called for, but this must be reserved for another time.
31. Kant, *Metaphysics of Morals*.
32. Derrida, *La peine de mort*, 129.
33. Derrida, *De quoi demain*, 259, 261.
34. Jacques Derrida, *La Bête et le souverain*, vol. 1 (Paris: Galilée, 2008), 81.
35. Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: University of Chicago Press, 2005),

5; Derrida, *Voyous*, 211; Giorgio Agamben, *States of Exception*, trans. Kevin Attell (Chicago: University of Chicago Press, 2005); Derrida, *Voyous*, 142, 196.

36. Jacques Derrida, *Politiques de l'amitié* (Paris: Galilée, 1994), 87.
37. Schmitt, *Political Theology*, 11.
38. Derrida, *Force de loi*, 96.
39. Derrida, *Voyous*, 145–46.
40. Derrida, *Force de loi*, 101.
41. Derrida, *De Quoi demain*, 350, 349.
42. Derrida, *Death Penalty*, 1:282–83; *La peine de mort*, 1:380.
43. Ibid., 23; 50.
44. Derrida, *La peine de mort*, vol. 2 (Paris: Galilée, 2015), 214, my translation.
45. Derrida, *Death Penalty*, 126, 259; *La peine de mort*, 1:183, 350.

PART II

Derrida and His Interlocutors

CHAPTER 5

Derrida at Montaigne

A Stay of Execution

Katie Chenoweth

How does one calculate the age of a Marrano,
for example?

—JACQUES DERRIDA, *Aporias*

At Montaigne, among the Flowers

March 22, 2000, was a Wednesday, two days after the first day of spring. Jacques Derrida was teaching the final session of his regular seminar in Paris at the École des hautes études en sciences sociales (EHESS). He would soon be leaving Paris to repeat the seminar at Irvine, as he had done annually since 1986. On this March 22, Derrida informed the students and others who filled the EHESS lecture hall in Paris that he had just returned from a visit to the Château de Montaigne. Located near the city of Bordeaux in the Dordogne, the Château de Montaigne is where Michel de Montaigne (1533–1592) lived and executed his duties as seigneur. The philosopher took his now-famous name from this noble domain, which had been acquired in 1477 by his great-grandfather, Ramon Eyquem, a wealthy Bordelais merchant. Set apart from the main residence of the chateau is the tower where Montaigne composed his *Essays* from 1571 until his death in 1592. Although the chateau residence was seriously damaged by fire in the nineteenth century, Montaigne's tower has survived intact and has been an official *monument historique classé du XVIe siècle* since 1952. Visitors to the

tower are thus able to view Montaigne's third-floor library, the *librairie*, much as it existed during the essayist's lifetime, with the notable exception that the some fifteen hundred books it once housed have been removed. Led up the stairs by a tour guide, visitors today discover a semi-circular room with a desk and chair. Looking up, they are confronted with the library's most unusual feature: fifty-four Latin and Greek inscriptions traced on the ceiling beams.[1] The majority of these quotations were culled from the books owned by Montaigne. Though there are no attributions on the beams, a canny reader with classical humanist training would recognize lines from philosophers like Sextus Empiricus and Lucretius, playwrights like Euripides and Sophocles, lyric poets like Horace, and lines from the Bible. Even emptied of its books, the space of Montaigne's librairie thus offers itself to the visitor—like Jacques Derrida in mid-March of 2000—as a kind of text to be read and quoted.

Montaigne may well have had a specific genre of text in mind as he undertook to refashion the library space in 1571: namely, the commonplace books popular in France and elsewhere during the sixteenth century—the era's "memory store" and "information-retrieval system."[2] The reader would extract phrases, maxims, and sententiae from his readings—typically classical texts by Greek and Roman authors—before copying them out by hand into a separate notebook, ordered by topic. Commonplace books were heirs to the older genres of the anthology and florilegium, compilations of excerpts whose etymologies evoke at once a "gathering" and a "reading" of flowers (*antho-logia*, *flori-legium*). The Renaissance genre gave material and technical support to a humanist style of learning in which, according to Erasmus in his influential *De Copia*, the student-bee flits through a garden library of Greek and Latin authors, "lighting on every small flower of rhetoric, everywhere collecting some honey that he may carry off to his own hive."[3] Montaigne's library—a notebook in wood, perched high in the tower, structured and inscribed by its quotation-flowers—would represent an apotheosis of this humanist hive. Scholars now believe that the *Essays* in fact began as a commonplace book of Latin quotes culled from Montaigne's readings, before becoming a 107-chapter monument of vernacular prose. Flipping through the pages of the *Essays*, this origin is easy to envision: The quotations in his book number over thirteen hundred; almost all are in Latin, with occasional quotes in Greek, Italian, French, or Gascon.[4] Per Montaigne's indications to his publisher, quoted text is placed in italics and set off from the main body of text by a line break. Modern editors of the *Essays* have typically imposed additional paragraph breaks to render the work more accessible to modern sensibili-

ties and attention spans. In sixteenth-century editions, however, the citations were the only breaks in the text. They are the defining visual marks in the *Essays*, so many scars revealing where the body of the essays has been cut: verse cutting prose, Latin cutting French, other authors cutting Montaigne. In a late chapter, the essayist ironically describes his own text as "a bunch of other people's flowers [*fleurs estrangeres*]" for which he would seem to have "furnished nothing of [his] own but the thread to tie them."[5]

The librairie and the pages of the *Essays* thus share a graphic architecture and logic of quotation inspired by the commonplace book. Together, they form their own common place of writing. In a famous passage from "Of Three Kinds of Association" ("Des Trois Commerces"), Montaigne fully envelops the composition of the *Essays* inside the librairie, framing and enclosing his practice of reading and writing within the circular tower walls—a space that is just a turn away from "chez moy": "When at home, I turn aside a little more often to my library. . . . There I leaf through now one book, now another, without order and without plan, by disconnected fragments. One moment I muse, another moment I set down or dictate, walking back and forth, these fancies of mine that you see here. It is on the third floor of a tower . . .. There I spend most of the days of my life, and most of the hours of the day."[6]

The description of the tower library in this passage encircles and contains the description of Montaigne's textual practice; the latter moves at a more syncopated rhythm, cut by commas and its own temporal interruptions, split between a dictating tongue and a writing hand—just as the tower walls frame and shelter the disjointed and disseminating style of writing that takes place inside them. Montaigne's style of reading, framed by the library walls, puts books to pieces, unstitching their bindings ("à pieces descousues") even as the essayist ceaselessly gathers and reties them back together in his flori-lecture and antho-logic. Even before the cutting and pasting of citation begin, there is this ransacking arche-cut of fingers flipping the pages ("Là je feuillette . . . "): the florist's snip or the bee's sting needed to make the bouquet or the honey of writing. Quotation—on the page or ceiling—makes this cut *appear*, visibly and transformatively. Quotation offers the cut as phenomenon and gift, the "nosegay of strange flowers" bound by the essayist's thread. In the same stroke, this apparition of the quote cuts into one's "own" text or domestic space, tattooing it and putting it to pieces typographically. Once quotation intervenes, we can no longer pretend there is an "integral body"—the term we will find Derrida using when quoting Montaigne in the Death Penalty Seminars—when it comes to text, except as a phantasm promised or deferred. Montaigne's

tower, *monument historique* and monolith from the outside, reveals itself to the visitor to be supported and inscribed by prosthetic beams.[7] In order to read the quotations on the ceiling, the visitor must move about as Montaigne did when he dictated with his forked tongue about the librairie. The visitor must skip, like Montaigne, in and out of languages and authors—flitting from flower to flower, leaping from beam to beam.

On March 22, 2000, Derrida opened his seminar with a quote from Montaigne's *Essays*: "'To espouse,' 'to espouse at the cost of his or her life' [*espouser au pris de la vie*]. This is a quotation: 'to espouse at the cost of his or her life.'"[8] Derrida offers this quotation and immediately announces it *as* quotation or, in French, *citation*. Derrida then makes audible his act of quotation—vocalizing in the seminar context the quotation marks on his page—and characterizes it as a performative "ripping" from its page of origin: "I am dramatizing this quotation, I am theatricalizing it a little by ripping it from its page: 'to espouse at the cost of his or her life.'"[9] Already, he has repeated the short fragment—this now hyper-cut flower of Montaigne's, *espouser au pris de la vie*—three times. He calls this act of quotation "violent"; he admits to extracting the words from their "body" in order to better offer them up, in pieces, for the benefit of the crowd of students and others gathered for this final session of this academic year: "'To espouse,' 'to espouse at the cost of his or her life.' This is a quotation: 'to espouse at the cost of his or her life.' I am dramatizing this quotation, I am theatricalizing it a little by ripping it from its page: 'to espouse at the cost of his or her life.' Later I will tell you where it comes from and from which body, from the body of which sentence I violently, or theatrically, extract it so as to let you see and hear it."[10]

The source of the quotation remains anonymous for the moment; this could be any body dragged before the law in an act of *citation*. Montaigne's text—which we do not yet know is Montaigne's—has been rendered audible and visible through a cut, but the fullness of a *citation* remains suspended. The name of the author and the re-membering of the textual body are the promise of this citational violence. We are waiting for a body and a name.

The reader familiar with the *Essays* has seen this type of cut-quoting or quote-cutting before; it is Montaigne's "own." Here Derrida is taking a page from Montaigne's book in every sense; he makes pieces of the *Essays*, à la Montaigne. Even as he withholds the essayist's name, Derrida invokes him hyperbolically. Even if we do not yet know it, we are on our way to Montaigne. "Montaigne—" Derrida will finally write several pages later, interrupting his discussion of Kant and Camus, "Montaigne—from which

I am returning and toward whom I will return." (Montaigne, dont je reviens et vers lequel je reviendrai.)[11] The French especially equivocates between the proper name of Montaigne as a site and a signature, a place and a person. The very name *Montaigne* is cut and disseminated. Montaigne offers himself up for cutting in this way—not only because he takes his name from a place but because he has already subjected himself to such cutting by being a splicer of books and languages. Montaigne's pages come precut, as it were. The tower library, as we now know, is the scene of this (pre)cutting of the *Essays*. The session opens by inhabiting or being inhabited by this scene. Derrida will affirm his arrival in a parenthesis several pages later: "(since I'm at Montaigne, I'm going to stay a while)" ([puisque je suis à Montaigne, j'y reste un peu]).[12] In this final session, we pause with Derrida as he rests for a while—for the space of a parenthesis—at Montaigne.

The website of the Château de Montaigne informs the prospective visitor that a "guided visit of the Tower is an invitation to walk in the footsteps of the famous philosopher."[13] I will suggest in what follows that, in the wake of his visit to Montaigne, Derrida can be found treading in the essayist's footsteps: Retracing his path, inhabiting his literary and philosophical style, following him back and forth around his library in something of a mobile meditation grounded in a practice of *citation*. This is a moment deserving of attention for several reasons. Firstly, Montaigne did not preoccupy Derrida openly in the way of other philosophers or literary writers. If Montaigne can be considered a major presence in Derrida's corpus—and I believe he can—that presence is subtle: elliptical and gestural, borne out in the form of quotation and imitation. I am tempted to say that Montaigne is Derrida's secret, whether he knows it or not. It is perhaps especially surprising that Derrida would introduce Montaigne in this last session of the 1999–2000 seminar given that the topic is "Death Penalty." It may seem downright strange to find Montaigne making an appearance here given that, as Derrida will insist, the essayist lived and wrote before the question of capital punishment had become a question as such. Yet here is Montaigne, fortuitously appearing at the midpoint of the two-year Death Penalty Seminars. This may just be a chance philosophical encounter occasioned by an act of tourism; Derrida tells he was "lucky enough" to visit Montaigne's tower ("j'ai eu la chance"). But the very fortuitousness of this encounter—happening like Montaigne's own reading "without order and without method"—may, perhaps, open up a philosophical future for the death penalty that could not have been calculated in advance. This encounter may, indeed, constitute a lifeline suspended between two moments of

urgency: a call for help or pardon placed from one philosopher to another when life is on the line.

Epoché, or The Abolitionism to Come

Montaigne names for Derrida a place to stay, a citational scene. Perhaps more surprising, this name will come to operate not just as a toponym but also as a kind of chrononym: *Montaigne* is the name of a time before the death penalty has become a problem or question as such. Introducing a long quote from the *Essays*, Derrida writes: "This passage (since I'm at Montaigne, I'm going to stay a while) confirms the idea that abolitionism, the idea that the death penalty was a problem, had not emerged at the time (it will await the Enlightenment . . .)."[14] *Montaigne* puts us in a time when we are awaiting not only abolition—that time is still ours, today—but also *abolitionism*. The *Essays* come to us, Derrida affirms, from "a moment when the idea of condemning to death the condemnation to death had not really begun to surface."[15] To "stay at Montaigne a while" would thus also mean to take up residence within a kind of historico-philosophical parenthesis or suspension—*une époque* that would thus also act as a skeptical epoché—where/when a moratorium is placed on the very question of the death penalty: Before Kant, Beccaria, Hugo, or Camus, at *Montaigne* we may pause in this time where modern abolitionism has not yet "surface[d]."

This parenthetical time of Montaigne will be, first, one of meditation and prayer. In an interview titled "Epoché and Faith," Derrida speaks of the skeptical epoché as "the suspension of certainty, not of belief," which, he affirms, "is part of prayer" ("When I pray, it is [. . .] a very skeptical prayer").[16] In the Eleventh Session of the Death Penalty Seminars, we indeed find *Montaigne* operating as a site of prayer and meditation. Derrida confesses in a parenthesis that while at Montaigne, he was "deeply pained for him, who died so young"—noting that the essayist died in his fifties, an old man in his own time but "like a teenager for our time"—and that he "felt a deep wave of inner compassion for him while meditating a few days ago next to what he no doubt loved the most."[17] He reminds us that Montaigne "kept a prayer stool in his bedroom" just beneath the library and above a chapel from which, "when he was ill, he could hear the chanting of the mass rising up toward him."[18] If Derrida "stay[s] at Montaigne a while," this stay would serve less as a retreat from political positioning or engagement than as a time and place from which to gather force, to place a skeptical call to Montaigne—"today," Derrida reminds us, "the chant or the song . . . would reach him by way of telephone"—before, at the end of this

first year of the seminars, placing the more resounding call to "militate, while waiting, for what is called the abolition of the death penalty" and to begin a forward march on the philosophical tradition that upholds the death penalty.[19] Here we suspend the question of capital punishment, just for a while—the time of a cut and a prayer, a quick *coup de fil*. At Montaigne, Derrida can profess a contingent ignorance. With Montaigne he can ask: Que sçay-je? What new or, indeed, very "old" abolitionism—what other form of nonoppositional opposition to the death penalty—might appear on the horizon of this suspension?

The majority of quotations from Montaigne's librairie eventually found their way into his book. They appear with particular insistency in the longest chapter of the *Essays*, the "Apology for Raymond Sebond."[20] It is in this chapter that Montaigne undertakes his most rigorous and sustained engagement with Pyrrhonian skepticism and announces his famous motto: Que sçay-je? "What do I know?" Quotation will emerge here as a skeptical practice, the beams of Montaigne's tower library figuring the Pyrrhonian epoché. Indeed, the Pyrrhonian philosophers are architects of suspense: They "suspend and keep [. . .] ambiguous" the consenting function of the soul "without inclination or approbation, however slight, in one direction or the other."[21] The "profession" of these philosophers was "to waver, doubt, and inquire, to be sure of nothing, to answer for nothing."[22] Pyrrhonism also turns out to be pharmacological. This radical "ambiguity"—the rigorous suspension of the faculty of assent—leads to a state of tranquility called ataraxia. Montaigne describes the production of ataraxia in the following way: "Now this attitude [*assiette*] of their judgment, straight and inflexible, taking all things in without adherence or consent, leads them to their Ataraxy, which is a peaceful and sedate condition of life, exempt from the agitations we receive through the impression of the opinion and knowledge we think we have of things."[23] The act of quotation, which keeps the reader suspended between languages (French/Latin), texts (*Essays*/other books), and times (modernity/antiquity), would itself seem to perform the skeptical attitude on a formal and material level. *Citation* as Montaigne practices it is ataraxic; it tranquilizes our certainty as we jump, over and over, in and out of languages, texts, and times. It is in this way that Pyrrhonian tranquility is strategic: It exercises a force. "They advance their propositions only to combat those they think we belive in," Montaigne insists.[24] This force is, more specifically, that of a delay. The Pyrrhonians do not seek to be believed by advancing "wild" and "contradictory" propositions. Instead, they look to "create doubt and suspension [*surceance*] of judgment."[25] Montaigne's word translated here by Donald

Frame as "suspension" is *surceance*, the nominal form of the verb *surseoir*, a juridical term that already meant in Montaigne's time "to defer, delay, postpone," "to adjourn" (a hearing), "to stay" (an execution), "to reprieve" (a capital sentence).[26]

The Pyrrhonians would represent the radical inverse of all those believers cataloged by Montaigne in the long passage Derrida quotes in his Death Penalty Seminars, those who espouse an "opinion" at the cost of their lives: from the man in Picardy who would rather be hanged than marry a girl with a limp, to the wives who follow their husbands onto the funeral pyre, to those who accept "the cruelest deaths" rather than change their law, their king, or their religion. Derrida asks that, when we hear Montaigne say "any opinion is strong enough to cause someone to espouse it at the cost of his her life," we not forget that *opinion* has "a great force" for Montaigne. "'To opine' means *to say yes*, to judge by *saying yes*, by affirming, by believing as well . . . to opine, thus, as a believer."[27] What the Pyrrhonian attitude or assiette combats is precisely the yes-saying that constitutes belief—combats it by suspending it, delaying it. The Pyrrhonians have, for the time being, stopped believing in belief. Theirs is "an extremity of doubt that shakes its own foundations."[28] The Pyrrhonian assiette thus suspends not only the believing of any particular belief but also the wanting to believe of believing, which, as Derrida insists, "come down to the same thing." What the Pyrrhonian attitude combats under the name of *opinion* is the logic and force of sacrifice, that lifeblood of the death penalty: "Opinion here has the force of an act of faith that says *yes*, and it is the force of this force that exceeds life [. . .], that amounts to sacrificing life to its force, to the force or the intensity of its *yes*."

In his stay at Montaigne that suspends the very question of the death penalty in the Eleventh Session, I would be inclined to see Derrida adopting, for a moment, the radical skepticism of the ancient Pyrrhonian philosophers—adopting it, like Montaigne, in a contingent way, for the space or time of a session or an essay. In this contingent suspension, however, another future for the death penalty announces itself. It is worth recalling that, prior to retiring to his tower to write the *Essays*, Montaigne had a legal career that required him to pass judgments, make opinions, take decisions, and issue punishments. Even after he began writing his book, Montaigne continued to have an active political career as mayor of Bordeaux and as mediator in the religious wars between Catholics and Protestants that ravaged France during the second half of the sixteenth century. In the chapter "Of the Lame," Montaigne turns his skeptical attitude and his radical profession of ignorance to a juridical scene, bringing it to bear

explicitly on a case of capital punishment. Even if, with Derrida, I must admit that what we are about to see still does not constitute an "abolitionist discourse," per se, I would say that it critically interrupts the practice of capital punishment by extending its time line and rendering it incalculable. In this passage, Montaigne discusses a case he witnessed and read about as a twenty-seven-year-old law student:

> In my youth, I read about the trial of a strange case, which Corras, a counselor of Toulouse, had printed, about two men who impersonated one another. I remember (and I remember nothing else) that he seemed to me, in describing the imposture of the man he judged guilty, to make it so marvelous and so far surpassing our knowledge and his own, who was judge, that I found much rashness in the sentence that had condemned the man to be hanged. Let us accept some form of sentence which says "The court understands nothing of the matter," more freely and ingenuously than did the Areopagites, who, finding themselves hard pressed by a case that they could not unravel, ordered the parties to come back in a hundred years.[29]

This suspension of capital punishment that Montaigne proposes, taking this case as an exemplum of all judgment, is a profession of ignorance: "The court understands nothing of the matter." With this profession, the case will be deferred; the parties must return "in a hundred years." This stay of execution—just long enough to extend beyond our allotted lifetime—amounts to an indeterminate, if not infinite, deferral. The profession of ignorance has a slowing effect; like the Pyrrhonian ataraxia, it tranquilizes the certainty of judgment while bodies and lives are left to run their course. This skeptical abolitionism does not abolish the death penalty but instead interrupts the calculative language of justice. Like Pyrrhonian combat, its force comes from its "mild" (*molle*) manner. Montaigne writes in the same chapter that "all the abuses in the world" arise from "our taught to be afraid of professing our ignorance."[30] His *Essays* teach us another profession—or "confession"—in another, softer style: "I like these words, which soften and moderate the rashness of our propositions: 'perhaps,' 'to some extent,' 'some,' 'they say,' 'I think,' and the like [*A l'avanture*, *Aucunement*, *Quelque*, *On dict*, *Je pense*, *et semblables*]. Anyone who wants to be cured of ignorance must confess it."[31]

Abolitionism at Montaigne—this skeptical abolitionism that, by professing ignorance, creates another temporality of judgment—would have the structure of an abolitionism *à venir*, "to come." For Derrida, the "to" of the "to come" does not assure a future. Instead, it "wavers between the

imperative injunction (call or performative) and the patient *perhaps* of messianicity (nonperformative exposure to what comes, to what can always not come or has already come)."[32] This patience might be what allows an abolitionism of epoché—an abolitionism without abolition—to survive, alongside the patient death penalty. "Even when the death penalty will have been abolished, when it will have been purely and simply, absolutely and unconditionally, abolished on earth, it will survive; there will still be some death penalty."[33]

Circum-citation

"This is a quotation: 'to espouse at the cost of his or her life.' I am dramatizing this quotation, I am theatricalizing it a little by ripping it from its page: 'to espouse at the cost of his or her life.' Later I will tell you where it comes from and from which body, from the body of which sentence I violently, or theatrically, extract it so as to let you see and hear it."[34] In earlier sessions of the Death Penalty Seminars, one has heard or read the history of prisoners' bodies subjected to the theatricalization of punishment: bodies framed, timed, and sliced by the death penalty. In the opening lines of this final session of the seminar's first year, the body undergoes a transubstantiation of sorts, becoming a body of text—Montaigne's body of text—which Derrida makes a show of cutting for us with exacting timing and precision. The *citation* is now a summons before the heteronomous law of the other. Montaigne's tower library is no longer just a scene of reading and writing but one of punishment. The beams of the library morph from a beehive into the machinery of capital punishment: a gallows or gibbet; the wooden guillotine frame. To all appearances, *citation* is now on the side of death—and of the death penalty. And yet this *citation* is opened by a question of survival; in fact, it would seem to be called or summoned—cited to appear—by that question: "How to sur-vive? How to understand, in a sure enough way, the 'sur' of survive? What is survival? And 'The death penalty as theater of life,' let us also say theater of sur-vival."[35] *Citation* emerges as part of this "theater of sur-vival" or *sur-vie*, that surplus of life that marks and exceeds "life." If the cut of citation calls up the scene of the guillotine and the death penalty, in what way might it also mark an affirmation of life: a yes-cutting, or a cut of survival?

The body-as-text metaphor appears famously in Montaigne's *Essays* with his characterization of his book as a "book consubstantial with its author . . . member of my life." "Consubstantiality" was, of course, a charged notion in the context of the sixteenth-century wars of religion,

bound up in the Protestant challenge to the Catholic tenet of the transubstantiation of the Eucharist. Montaigne was a professed Catholic all his life; still, the *Essays* stage (in Derrida's words) a "hand-to-hand combat with Christianity."[36] Perhaps it is not surprising, then, to find Montaigne's book secularizing and appropriating the Protestant doctrine of the body of Christ to designate his book as "consubstantial" with himself and his body, "member of [his] life," just as Montaigne elsewhere announces he is himself the "matter of [his] book." This *con*-substantiality would not be flesh *made* word or vice versa but rather—according to a more dynamic and contaminating metonymy—body and book grafting onto one another to the point where the distinction between literal and figurative senses of terms like *member* or *life* become difficult to separate.

Or a term like *decircumcision*. Indeed, this promise of a name in Derrida's opening of the seminar, along with the convergence of cutting and naming, recall yet another scene: namely, the ritual ceremony of circumcision in Judaism: "When I summon to appear on stage the body of this entire sentence and the paragraph to which it belongs, you will see that it is a matter of religion, of circumcision and even decircumcision. The text waiting to appear says in fact 'decircumcise oneself.' 'To cause someone to espouse it at the cost of his or her life.' I leave you to dream about this sentence fragment more or less painfully stolen from its integral body."[37]

Circumcision traverses Derrida's work. It can be found in, among other texts, *Glas*, *The Post Card*, *Archive Fever*, *Ulysses Gramophone*, and, perhaps most prominent, *Shibboleth* and *Circumfession*. In this last text, Derrida comments on his own preoccupation with the topos. He will confess—hyperbolically but also with a passionate autobiographical and even philological conviction—that circumcision is "all I've ever talked about."[38] For John Caputo, circumcision in Derrida's work is the cut that opens the word, heart, or ear to the other as *tout autre*—that is, to any and every other, but also to the wholly other. Circumcision "ruptures the sphere of the same [. . .], cuts off closure and opens our heart."[39] In this sense, for Caputo, "deconstruction *is* circumcision, the cut that opens the space for the incoming of the *tout autre*," and "circumcision is the cut that says yes."[40] Has Montaigne been called onto the stage of sur-vival in order to be circumcised?

Derrida has told us that we will witness a ritual of naming later on, when he un-cuts Montaigne: "When I summon to appear on stage the body of this entire sentence [. . .] you will see that it is a matter of circumcision, and even decircumsion. The text waiting to appear says in fact 'decircumcize oneself (*se décirconcire*).'" In fact, Montaigne does not just "say" that

strange and rare term, *se décirconcire*, he coins it or baptizes it—that is, he says it for the first time. The few modern French dictionaries that include *se décirconcire* will cite this very passage from the *Essays* as the original usage. The earliest appearance of *déconcire* or *décirconcicsion* in a French dictionary is Émile Littré's *Dictionnaire de la langue française* (1863). Littré defines *décirconcire* as "to cause [someone] to renounce a religion that consecrates circumcision (Judaism or Islam)."[41] The dictionary includes this qualifying remark: "Since circumcision is something physical that cannot be undone, to decircumcise and decircumcision are not good words, able to be taken only in a figurative sense."[42] The passage from circumcision to decircumcision is also a passage from the literal to the figurative. This passage seems only too fitting, given that this very division that marks (as Derrida noted more than once) a certain Judeo-Christian difference and the attempted cancelling out—notably by Paul in the Epistle to the Romans—of Judaism in the passage from circumcision as surgical event to a metaphorical and spiritualized "circumcision of the heart." Montaigne's *se descirconcire*, "to decircumcize oneself," is a hyperbolically figurative term that exposes the double violence of conversion and this Pauline negation. At the same time, the physically unrealizable "de-" flaunts the indelible character of the cut and the impossibility of transcending the letter or the body.

Derrida reminds us that such a forced conversion in fact marks Montaigne's own family history on the side of his mother: "Well, Montaigne, whose tower I was lucky enough to visit last week, Montaigne, whose wily and enigmatic hand-to-hand combat with Christianity, or even with the Marrano Judaism that haunted his filiation on the side of his mother, would deserve more than one seminar, Montaigne, who died a Christian death in his bed in his fifties."[43] Montaigne's mother, Antoinette de Louppes de Villeneuve, was the daughter of Pierre Lopez, a Spanish Jew who converted to Catholicism before arriving in France; her grandfather Micer Pablo Lopez de Villanueva was burned at the stake by the Inquisition in 1491.[44] The extent of Montaigne's knowledge of this history or of his own Marrano identity is uncertain. We do know from his travel journal that, while in Italy, Montaigne visited multiple synagogues and spent a day in Rome's Jewish quarter where he witnessed a circumcision. However aware or unaware Montaigne may have been of it, we know now that his own maternal lineage had been "decircumcised" in precisely the sense that he—for the first time—ascribes to this term. We find this word in the passage Derrida cites in full, at last, in the final pages of his seminar: "Any opinion is strong enough to cause someone to espouse it at the cost of his

or her life. The first article in that fair oath that Greece swore and kept in the war against the Medes was that every man would rather exchange life for death than Persian laws for their own. In the wars of the Turks and the Greeks, how many men can be seen accepting the cruelest of deaths rather than decircumcise themselves in order to be baptized? This is an example that no religion is incapable of."[45]

Derrida reads in this passage a hypothesis about religiosity as survival: "Every religion is capable of preferring something else to life, at the cost of life. In other words, religion is or grants the surviving of survival."[46] Religion, or rather "the religious of religion," is bound by the force of opinion to sacrificial logic of the death penalty: "The religious of religion is always the acceptance of sacrificial death and the death penalty, in the shadow of a sur-viving that supposedly is worth more than life."[47] Decircumcision would mark an alternative to this form of survival; it is the conversion, the espousal of life at the cost of belief, the antisacrifice. Decircumcision is the becoming secret of the scar, its dis-appearance under the skin, in the name of life. In the passage that follows this in Montaigne's text—a manuscript addition to the *Essais* in the so-called Bordeaux Copy—the essayist reports on the fate of Spanish Jews who sought refuge in Portugal only to meet with further cruelty and inhumane treatment. "Some turned Christians," he reports; "of their faith, or of that of their descendants, even today, a hundred years later, few Portuguese are sure."[48]

As for Montaigne, his own life was made possible through his mother's line thanks to precisely such a decision. Montaigne was alive because he was uncut—whether he knows this or not. A different kind of conversion marks his father's side. Though he was christened Michel Eyquem, the essayist became the first in his father's line to call himself "of Montaigne." In the family *livre de raison*—an almanac used to record events like baptisms, weddings, and deaths—we find that he has crossed out in a single stroke the patronymic *Eyquem* and written in the toponymic *de Montaigne* in the entries for his father's birth (September 29) and his own (February 28). Montaigne: another name for (de)circumcision, for the Marrano or the secret cut. "Let us figuratively call Marrano," Derrida writes in *Aporias*, "anyone who remains faithful to a secret that he has not chosen, in the very place where he lives. . . . In the dominant culture that by definition has calendars, this secret keeps the Marrano even before the Marrano keeps it."[49] Derrida would have us regard him, too, as a Marrano Jew—along with ourselves: "Marranos that we are, Marranos in any case, whether we want to be or not, whether we know it or not."[50]

Derrida, for his part, is not always able to remain faithful to Montaigne or to follow his thread. He quotes a passage from the chapter "A Custom of the Isle of Cea," an essay whose title refers obliquely to suicide: "It comes to the same thing if a man puts an end to himself or passively suffers it; whether he runs to meet his last day or awaits it; wherever it comes from, it is always his; wherever the thread [*filet*] may break, the whole thread is broken, the spindle is at an end. The fairest death is the one that is most willed."[51] Derrida confesses that he is "fascinated by this figure," which he is "not sure [he] understand[s]."[52] The classical commonplace would have been familiar and legible to most Renaissance readers: the *filet*, or thread, in question is that of the *moirae*, the fates who weave each person's life as a thread on a spindle and who bring about with a cut. "I don't know what Montaigne means," confesses Derrida.[53] But precisely because this filet eludes him—whether or not that confusion is bound up in the four hundred years separating Derrida from Montaigne, the four hundred years of French-language history that have severed the modern word for thread, *fil*, from Montaigne's *filet* (which means "net" in modern French), and whether or not this confusion is a true or feigned lapse on Derrida's part—whatever the case may be, the confusion allows Derrida to set Montaigne's language spinning. He propels us from the opening scene of citation as theatrics, violence, and circumcision into a circus where citation becomes phantasm and a cinema of belief and life insurance. Where Montaigne has more or less discernibly followed the recognizable thread of a classical metaphor in his evocation of death as a cut, Derrida does not follow in kind. His own reading of Montaigne turns into a wild trapeze act in which we may even become scared for him, wanting to believe in his reading but also knowing that he is playing a risky game. Here is Derrida in Montaigne's tower library, leaping from beam to beam but citing without a net. What the filet citation stages is a failure or near-death of reading; yet this very act of failed reading, in which Derrida knowingly risks being a bad heir to Montaigne's text, is precisely the act that opens the possibility of textual survival. "This death would thus be that of a trapeze artist who decides himself to put an end to the net or to the belief in this imaginary or phantasmatic net that was his life insurance, allowing him to live and survive as a tireless trapeze artist."[54] The net of citation is language itself: in this case, French, the language ceaselessly cut by Latin in Montaigne's *Essais*, and that spans—or does not quite manage to span—the chasm of four centuries.

Montaigne has already provided us with an image of how a text might survive and even thrive on its cuts: "Someone could say of me that I have made here only a collection of foreign flowers, providing of my own only

the thread to tie them together." The quotations of the *Essais* are held together by the thread or net of Montaigne's text, that member and graft of his body that is also "his life"—a life cut and multiplied by the "foreign," but surviving. Derrida's *sur-vie* would seem only to open when life and language are interrupted in this way. Derrida asked in the prologue to this session how we could be *sure* of understanding the "*sur*" of *sur-vival*. This interruption of understanding between Derrida and Montaigne, at Montaigne, would seem to suggest that sur-vival is radically and necessarily *unsure*. It is both a circumcision—an affirmative cut that passes through death, through the other, and cuts his or her thread—and, at the same time, a decircumcision—an uncutting cut that keeps giving me back, over and over, my own body as integral, my life—my filet, my bouquet.

NOTES

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1. For a comprehensive description and history of Montaigne's librairie and the beam inscriptions, see Alain Legros, *Essais sur poutres: peintures et inscriptions chez Montaigne* (Paris: Klinckseick, 2000).

2. Ann Moss, *Printed Commonplace Books and the Structuring of Renaissance Thought* (Oxford: Oxford Clarendon Press, 1996), 6.

3. Desiderius Erasmus, *On Copia of Words and Ideas*, trans. Donald King and H. David Rix (Milwaukee, Wisc.: Marquette University Press, 1963), 90.

4. The function of quotation in the *Essays* has been the subject of much scholarly attention. For major studies of this question, see Mary McKinley, *Words in a Corner: Studies in Montaigne's Latin Quotations* (Lexington, Ky.: French Forum, 1981), and Antoine Compagnon, *La seconde main, ou le travail de la citation* (Paris: Éditions du Seuil, 1979).

5. Michel de Montaigne, *The Complete Essays of Michel de Montaigne*, trans. Donald Frame (Stanford, Calif.: Stanford University Press, 1958), 808; *Les Essais*, eds. Pierre Villey and V.-L. Saulnier (Paris: Presses Universitaires de France, 2004), 1055. "Comme quelqu'un pourroit dire de moy que j'ay seulement faict icy un amas de fleurs estrangeres, n'y ayant fourny du mien que le filet à les lier." John Florio's translation of 1603 more closely approaches Montaigne's language: "As by some might be said of me: that here I have gathered a nosegay of strange floures, and have put nothing of mine

unto it but the thred to binde them." See Michel de Montaigne, *The essayes, or Morall and militarie discourses of Lo. Michaell de Montaigne*, trans. John Florio (London: E. Blount, 1603).

6. Montaigne, *Complete Essays*, 628–29, translation modified; *Essais*, 828. "Chez moy, je me destourne un peu plus souvent à ma librairie. . . . Là je feuillette à cette heure un livre, à cette heure un autre, sans ordre et sans dessein, à pieces descousues; tantost je resve, tantost j'enregistre et dicte, en me promenant, mes songes que voicy. Elle est au troisiesme estage d'une tour. . . . Je passé là et la plus part des jours de ma vie, et la plus part des heures du jour." Here, once again, Florio's 1603 translation captures better the librairie style: "At home I betake me somwhat the oftener to my Librarie. . . . There without order, without methode, and by piece-meales I turne-over and ransacke, now one booke and now another. Sometimes I muse and rave; and walking up and downe I endite and enregister my humors, these my conceits" (398).

7. On beams as prosthesis and Derrida's "wooden logic" of the tongue, see David Wills, *Matchbook: Essays in Deconstruction* (Stanford, Calif.: Stanford University Press, 2005), especially 151–54.

8. Jacques Derrida, *The Death Penalty*, vol. 1, trans. Peggy Kamuf (Chicago: University of Chicago Press, 2014), 270.

9. Ibid.

10. Ibid.

11. Ibid., 274.

12. Ibid., 278.

13. "La Tour Historique," *Château Michel de Montaigne*, http://www.chateau-montaigne.com/fr/montaigne/8-la-tour-historique.

14. Ibid.

15. Ibid.

16. Yvonne Sherwood and Kevin Hart, *Derrida and Religion: Other Testaments* (New York: Routledge, 2005), 30–31.

17. Derrida, *Death Penalty*, 1:276.

18. Ibid., 277.

19. Ibid., 277, 283.

20. Montaigne, *Essays*, 12.

21. Montaigne, *Essays*, 372; *Essais*, 503.

22. Ibid.

23. Ibid.

24. Ibid.

25. Ibid.

26. *Larousse Online*, s.v. "surseior," http://www.larousse.fr/dictionnaires/francais-anglais/surseoir/75009.

27. Derrida, *Death Penalty*, 1:279.

28. Montaigne, *Essays*, 372; *Essais*, 503.
29. Ibid., 788/1030.
30. Ibid.
31. Ibid.
32. Jacques Derrida, *Rogues: Two Essays on Reason*, trans. Pascale-Anne Brault and Michael Naas (Stanford, Calif.: Stanford University Press, 2005), 91.
33. Derrida, *Death Penalty*, 1:282.
34. Ibid., 270.
35. Ibid.
36. Ibid., 276.
37. Ibid., 270.
38. Jacques Derrida, *Circumfession*, in *Jacques Derrida*, by Geoffrey Bennington and Jacques Derrida, trans. Geoffrey Bennington (Chicago: University of Chicago Press, 1993), 70.
39. John Caputo, *The Prayers and Tears of Jacques Derrida: Religion without Religion* (Bloomington, Ind.: Indiana University Press, 1997), 250.
40. Ibid.
41. Émile Littré, *Dictionnaire de la langue française*, vol. 1 (Paris: Imprimerie Générale de Ch. Lahure), 985, my translation. "Faire renoncer à une religion qui consacre la circoncision (judaïsme ou islamisme)."
42. Ibid. "Comme la circoncision est quelque chose de physique qui ne peut être défait, décirconcire et décirconcision ne sont pas de bons mots, ne pouvant se prendre qu'en un sens figuré."
43. Derrida, *Death Penalty*, 1:276.
44. For an inquiry into Montaigne's Jewish heritage and a reading of the *Essais* as a Marrano text, see Sophie Jama, *L'Histoire juive de Montaigne* (Paris: Flammarion, 2001). Philippe Desan's recent biography of Montaigne strikes a more cautious note, arguing that his mother's Jewish ancestry is not sufficiently documented. "Although it is possible, Antoinette de Louppes's Jewish origin has never been demonstrated with certainty and does not allow us to conflate Montaigne's familial origins with his cultural and religious identity." Philippe Desan, *Montaigne: A Life*, trans. Steven Rendall (Princeton, N.J.: Princeton University Press, 2017), 14.
45. Montaigne, *Essays*, 35; *Essais*, 53; qtd. in Derrida, *Death Penalty*, 1:280–81.
46. Derrida, *Death Penalty*, 1:279.
47. Ibid.
48. Montaigne, *Essays*, 36; *Essais*, 54.
49. Jacques Derrida, *Aporias*, trans. Thomas Dutoit (Stanford, Calif.: Stanford University Press, 1993), 81.

50. Ibid.
51. Montaigne, *Essays*, 252; *Essais*, 351; qtd. in Derrida, *Death Penalty*, 1:274–75.
52. Derrida, *Death Penalty*, 1:275.
53. Ibid.
54. Ibid.

CHAPTER 6

"Bidding Up" on the Question of Sovereignty

Derrida between Kant and Benjamin

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Derrida's seminar on the death penalty proceeds from what might appear as a conflicting set of circumstances. Focusing on a phenomenon—the death penalty—that had been abolished in France since 1977, Derrida builds an argument against a practice the political significance of which depends on two very different national contexts, French and American (these were the two main audiences for Derrida's seminars). In the French context, the concerns of the seminar more than likely appeared at the outset to be primarily historical, as they deal with a set of concerns no longer pertinent to the juridical-political system of the present. When applied to the United States, however, Derrida's seminar addresses an audience for whom the death penalty is a firmly established juridical-political principle, one that is indeed sacrosanct. Even today, no candidate for political office in the United States dares to oppose the death penalty, since opposing it means almost certain electoral defeat. In fact, as Derrida demonstrates, popular support has by and large kept the death penalty out of party politics, since it functions only as a "wedge issue" that the Right uses for political purposes. It is worth recalling that at the time the seminars were delivered in 1999/2000, then–presidential candidate George W. Bush had presided

over more executions as governor of Texas than any other governor in history; today, that mantle has been passed to Bush's successor, Rick Perry.

Although these two different contexts might appear to be essentially incommensurate, Derrida's seminars on the death penalty are, in fact, much more global in scope, in both senses of the word, than these two national contexts. For, even in the American context, as Derrida insists, the death penalty is beginning to disappear in its present form, becoming less and less visible, outlawed in more states today than ever before. The disappearance of the death penalty in the United States is being accelerated not by moral or political interests but by commercial ones. Pharmaceutical companies, for whom maintaining a certain public perception is more profitable than producing the relatively small quantities of the substances required to administer lethal injections, no longer manufacture them, making the practice of the death penalty in the United States more difficult. As recent cases have shown, the practice of the death penalty and the Eighth Amendment of the Constitution, which rules out cruel and unusual punishment, are becoming increasingly harder to reconcile.[1] In fact, it appears that the inability to administer lethal injection may actually threaten the very existence of the death penalty as a constitutionally sanctioned form of punishment or, at the very least, may force states to return to older forms of the death penalty, such as the firing squad.[2]

While cognizant of the political and historical contexts that separate France and the United States, Derrida's abolitionist argument in the seminars actually begins an analysis of the condition of the death penalty's (gradual) global disappearance. There is, in other words, a subterranean dimension of Derrida's seminar that goes beyond simply generating a philosophical argument in favor of the abolition of the death penalty. What actually interests Derrida far more is separating out the various conditions that produce the death penalty's disappearance, since certain aspects of its withdrawal from the global scene nonetheless threaten to keep it intact in forms that are no longer part of the legal apparatus of the state. Derrida, avowedly abolitionist, is well aware that the disappearance of the death penalty in France, and even its possible eventual disappearance in the United States and across the globe, might in the end entail nothing more than a case of bad faith or a sleight of hand. If what disappears is simply the state-sanctioned version of the death penalty, this does not necessarily mean that what Derrida defines as the legal, state, or metaphysical "scaffolding" that legitimizes it has been undermined as well. One might even go so far as to say that one of Derrida's main points of interrogation concerns the way in which even abolitionist discourses, sometimes unwittingly,

reaffirm this underlying scaffolding. This is why his argument in the seminar tends to address the death penalty as something more akin to a symptom, a place of excess within the legal system that must be interrogated precisely before it disappears entirely. For, as Derrida insists, the death penalty is not just one punishment among others: It is a site, a point of tension within the juridical-political order that makes visible a set of relays, an entire structure, which Derrida calls its "onto-theological scaffolding."[3] As an excess internal to the legal system, the death penalty is also a place within that system that reveals its profound connection with the structure of political sovereignty in general, as well as its ontotheological foundation.

Thus, Derrida's target in the seminars is not merely the death penalty itself but also the apparatuses and constructs that subtend it, justify it, and that, in many cases, form the basis of a number of abolitionist arguments. This is why Derrida's major contribution to an abolitionist discourse on the death penalty is marked both by an insistence on philosophical rigor and on the question of strategy. The strategy at stake is not quite one that a political activist might resort to, for example, to organize a campaign to target pharmaceutical firms that manufacture the drugs and anesthetics used in the administration of the death penalty possible in the United States. While these are important strategic campaigns, the strategy in Derrida's case involves an attempt to dismantle the underlying ontotheological background that makes the death penalty possible and that might, in the end, allow it to continue to exist in other forms. This particular strategy speaks to Derrida's remarkable claim that no philosopher in the history of philosophy has stood in principle against the death penalty.[4] In fact, as Derrida makes clear in the first volume of *The Death Penalty*, abolitionist arguments have tended generally to be the domain of writers considered to be "literary," such as Victor Hugo.[5] Such claims introduce the rather daunting task Derrida sets for himself: an attempt to think, with the help of a philosophical tradition that offers no obvious precursors, a principled opposition to the death penalty that goes straight to its heart, as it were, rather than by attempting to moderate the implementation of the death penalty through questions of utility. Arguments that claim, for example, that the death penalty is too expensive, or that it is not sufficiently a deterrent against crime, miss the point insofar as they leave intact the principle of the death penalty itself, a principle that will always remain waiting in the wings, given the right conditions. Just as the prohibition against cruel and unusual punishment can be circumvented by the anesthesio-logic that made lethal injection in the United States the preferred means of the

administration of the death penalty, allowing it to persist on the basis that, though perhaps "unusual," it was no longer cruel, so do abolitionist arguments that proceed from questions of utility provide a potential alibi for the death penalty, allowing it to return to the juridical-political sphere under the right conditions. An attempt to oppose the death penalty *in principle* is the crucial and unique dimension of Derrida's project. While others have and continue to oppose it, they tend to do so, Derrida claims, without directing their abolitionism to the crucial principles, or philosophical scaffolding, that subtends it.

A precise account of Derrida's strategy is therefore required in order to understand the nature and scope of his abolitionist critique. One of the cornerstones of this strategy is to take up the texts of a philosophical tradition and to address what I will call multiple "figures of excess" in the texts of his interlocutors. These figures of excess then become points wherein a particular principle or commitment takes shape within the juridical-political order, even as it simultaneously exceeds that order in specific ways. The death penalty itself would be an example of one such figure: A penalty like no other, it takes to the limit, and appears to even exceed, a variety of legal and juridical principles such as *jus talionis*, the notion that the punishment should fit the crime. Though it might seem as though the death penalty, usually reserved for capital cases, reaffirms the biblical "eye for an eye" principle of strict equivalence between crime and punishment, this principle is, in fact, pushed to its limit in the case of the death penalty, since the one punished is no longer present once the punishment is enacted. The death penalty becomes a site, therefore, where a different kind of principle enters the juridical-political sphere, one that disarticulates the relation between law and what is in excess of the law.

Derrida's seminar is striking, however, for the way that these figures of excess proliferate. (Though the death penalty is the main figure of excess that Derrida interrogates, it is by no means the only one.) It is precisely this proliferation, I will argue, that challenges the centrality of the death penalty itself, as if part of Derrida's strategy in the seminar is to position the death penalty as a figure of excessive punishment in relation to other possible figures of excess that emerge from the same logic. What is generally conceived of as the exceptionality of the death penalty as a unique form of punishment emerges, in fact, out of the logic of sovereignty itself—its need to ground itself, as Schmitt argues, on the exception. When Schmitt famously defines the sovereign in his 1922 book *Political Theology* as "he who decides the exception," the relation between the sovereign and

the exception on which his authority is grounded must be understood in a precise sense.[6] That is, the sovereign and the exception must be understood as co-originary. The sovereign does not decide when to introduce exceptional powers, for example in a state of emergency in light of an extraordinary situation that precedes his or her decision. Rather the sovereign decides *on* the exception in the sense that he decides on the very difference between exception and norm, determining when a state of exception is in place by suspending the law, and thereby producing the exceptional situation. As Schmitt insists, "The decision on the exception is a decision in the true sense of the word. Because a general norm, as represented by an ordinary legal prescription, can never encompass a total exception, the decision that a real exception exists cannot therefore be entirely derived from this norm."[7] The sovereign's authority emerges in and through the decision on the exception that, because it is not grounded in an existing legal norm, places the sovereign in a kind of liminal space. In the moment of decision, the sovereign is both inside and outside the legal system, at once the very ground of the legal system's authority and of its overturning. The sovereign is thus already the first figure of excess within the juridical-political order, since the decision on the exception by which the sovereign emerges cannot be grounded in the legal order itself. This is precisely why the co-origination of the sovereign and the exception introduces a series of effects that are felt even in the "normal" functioning of the juridical-political sphere. In the case of the death penalty, for example, it is the sovereign who gives himself the sole right of pardon. The structure of sovereignty and the institution of the death penalty, therefore, emerge over the same ground, through an analogical relation to the exception. The exceptionality of the sovereign produces and defines the exceptionality of the death penalty; they are coimplicated as places where the sovereign is grounded on a relation to the exception and where this relation is made visible or is given shape.

A hyperbolic punishment within the juridical system, which it nonetheless fundamentally exceeds, the death penalty is a figure of excess, a site within the juridical-political order that follows out the logic of the relation between sovereign and exception. That is, the death penalty points toward the alegal origin of that system, a place "before the law" that gives shape to a punishment "after the law," which maintains a relation to the exception by becoming a hyperbolic case of punishment. The question, then, is why Derrida's strategy is to proliferate these figures of excess, and play them off against each other, in what he himself defines as a necessary gesture of

hyperbolization or "*surenchère*"—a "bidding up" or outbidding toward something that is more than, over and above, a particular conception of sovereignty.[8] This gesture, Derrida keeps insisting, is a necessary one and is found both among supporters and opponents of the death penalty. It also constitutes the core of Derrida's philosophical abolitionism. If, for example, the principle of the dignity of Man, that which is proper to Man, provides a surreptitious sanctioning of the death penalty pointing as it does, for philosophers like Kant, toward something within Man that transcends his "mere life," Derrida locates a similar gesture or appeal in the other camp. Hugo's abolitionist discourse, for example, invokes a law above and beyond the state, a moral or theological law over and above the right and power of the sovereign as death-dealer.[9] As I will argue in what follows, Derrida's strategy is not merely to multiply these figures of excess but rather to attempt to think, through a repetition of the gesture of surenchère or "bidding up" in both pro–death penalty discourses and in abolitionist ones, another relation between the unconditional and its figuration, another relation between the sovereign and the exception on which it is grounded. Derrida does this by staging an encounter between two thinkers in order to have their texts solicit each other. Without making him choose one argument or text over the other, this strategy allows him to witness the ways in which a certain logic of the exception produces very different figures of the unconditional, different "figures of excess" in these texts. By focusing on how Derrida enacts his own gesture of "bidding up" through a reading of Benjamin's and Kant's similar gestures with regard to the death penalty, what begins to emerge is a reading strategy that does not simply pit one argument against another but instead attempts to disrupt the apparent isomorphism between a particular figure of excess and the underlying philosophical scaffolding that makes it possible. By engaging in this sort of reading, Derrida attempts to short-circuit the logic of the example, of exemplarity, that both arguments are predicated on, and by doing so opens each thinker up to ways in which the unconditionality of his argument might take another shape or form. Derrida does this by attempting to open a given "figure of excess" up to a different relation to the unconditionality or the exceptionality that underpins it. Derrida does more than add one more figure of excess to the tradition; he attempts to pursue other stakes, other forms of "bidding up" or surenchère that radically solicit, and thus destabilize, the sovereign logic of the exception, as well as the means by which the exception becomes manifested in the juridical-political sphere to begin with.

More Than One Surenchère: Between Kant and Benjamin

From the outset, Derrida suggests that the notion of a "principled" opposition to the death penalty, the very task of his seminar, encounters a specific limit: the assumed unity of the death penalty as a principle, in the singular, that one could oppose. To articulate a principled opposition to the death penalty is to seemingly take for granted the idea that there is only one logic of the unconditional, only one relation between norm and exception. Derrida poses this question most emphatically at the start of the second year of the seminar: Is it possible to take a principled stance against something that might not, in the final analysis, have an identifiable center? In Session Twelve Derrida addresses this possibility directly by insisting that the strategy he employs to map out the metaphysical scaffolding of the death penalty will necessarily entail several different itineraries, without assuming anything about the purported unity of the death penalty as a "principle": "We are going to try to multiply our points of departure and our approaches, as if, by dissociating and diversifying more than ever our angles of attack, we were still hoping to surround some vital center of the question."[10] The military metaphor of encirclement around a center will, Derrida claims, necessitate multiple threads and points of departure for the argument because it is not entirely clear where the "vital center" of the question of the death penalty might be located and because it is not entirely clear whether one even exists. Derrida thus raises the specter that the death penalty is itself always already multiple, that underneath its name lies not a unique reference but a series of further relays, from the question of the proper of Man, to the question of cruelty, to the logic of anesthesiology that governs the death penalty's existence. In Session Twelve Derrida links the apparent unity of the question of the death penalty with the dream or the desire to locate it in a single site: "Our only or in any case our primary concern will be to take seriously this apparent specificity, this appearance, this effect of specificity, the manner in which, under this name, the death penalty is constituted as a specificity-effect and continues to torment us today as such, under conditions that are more and more pressing, dramatic, urgent, at times unbearable."[11] One could, then, potentially be launching a principled opposition to something that would be nothing but a "specificity-effect," or what Derrida will later call an "identity *effect*," linking it with the simulacrum: "a simulacrum of identity."[12] The simulacrum of the death penalty's unity, or its very lack of one, would be its greatest form of self-defense, deflecting any principled stance in advance, since it is not, strictly

speaking, a concept or a principle that one can identify in order to stand against it.

The first strategic move in Derrida's argument, therefore, is to insist that a principled opposition to the death penalty cannot be formulated head-on: The death penalty always takes more than one shape, even if its name refers predominantly to its juridical form. In a series of close readings, Derrida shows how the logic of the unconditional and the exception underpin a variety of different "figures of excess"—some opposed to the death penalty, others reinforcing its apparent necessity. To that end, in the first year of the seminar Derrida positions Kant as one of the most rigorous defenders of the death penalty in the Western philosophical canon. Kant reappears throughout the second year of the seminar because he links the logic of the unconditional, the conception of the "proper of Man," and the death penalty into a single nexus. For Kant, the death penalty is a punishment that testifies to the dignity of Man as destined for an end beyond mere life. For Kant, as Derrida insists, the death penalty is fundamentally "disinterested"; it is not bound by any pathology of power. Its necessity emerges out of Man's super-sensuous vocation. It is therefore radically unconditional as a form of punishment; it is external to any question of utility or vengeance. In the first year of the seminar, Derrida focuses on what in Kant results from the imbrication of the proper of Man (Reason) and jus talionis, where the main counterpoint to this argument is found primarily in Nietzsche's critique of the notion of Kantian disinterestedness.[13] In the second year of the seminar Benjamin's argument in "Critique of Violence" becomes the counterpoint to Kant. For there Benjamin makes precisely the opposite claim: that the death penalty is the ultimate example of "law-preserving violence" and that the death penalty's fundamental interest is in preserving the law's monopoly over violence.

Derrida focuses on how Kant and Benjamin manage to generate two diametrically opposed conceptions of the death penalty, while drawing on a logic of the unconditional in what appears to be the same structure or "onto-theological scaffolding" that determines both. Since throughout the seminar Kant remains the most potent example of a philosophical argument in favor of the death penalty, it is worth recalling how the moral law, the unconditional, and the categorical imperative combine to justify his conception of a "disinterested" death penalty. While Derrida concentrates on Kant's arguments about the applicability of the death penalty in the "Doctrine of Right," I would argue that the logic of the unconditional can be found at work already in the more abstract preoccupations of the *Critique of Practical Reason*.[14] If in the "Doctrine of Right," the death penalty is

linked to the proper of Man as destined for an end beyond mere life, in the *Critique of Practical Reason* this argument is derived from the very unconditionality of the moral law itself. Kant insists that the categorical imperative must divest itself of any and all "pathological" interests in carrying out what it demands—any interest, that is, aside from what the moral law dictates. The unconditionality inherent to the moral law underpins Kant's argument in the "Doctrine of Right" that a punishment such as the death penalty can be determined only in relation to the law itself and not in terms of the effect the punishment will have (on society, on the guilty party, and so on). In the case of the death penalty specifically, Kant effectively eliminates the means/ends structure that governs standard juridical logic, paving the way for a hyperbolic punishment—the death penalty—that takes place inside the juridical order, but that insistently exceeds all questions of utility. One of the fundamental justifications for the necessity of the death penalty, according to Kant, is not that it acts as a deterrent but that it goes beyond the question of efficacy or interest, directed purely by the purpose of the moral law itself.

What emerges from this disinterestedness is a connection between the death penalty and the moral law: The death penalty comes to be articulated as the presentation of the unconditional ground of the moral law, its very "facticity" within the juridical. For Kant, the moral law is famously self-authorized and self-authorizing, a figure of the unconditional itself. In lieu of a logical "deduction" of the kind one finds in the *Critique of Pure Reason*,[15] the "deduction" of the moral law in the *Critique of Practical Reason* follows immediately from its unconditionality and from the presupposition of the law itself:

> But something different and quite paradoxical takes the place of the vainly sought deduction of the moral principle, namely that the moral principle, conversely itself serves as the principle of the deduction of an inscrutable faculty which no experience could prove but which speculative reason had to assume as at least possible (in order to find among its cosmological ideas what is unconditioned in its causality, so as not to contradict itself), namely the faculty of freedom, of which the moral law, which itself has no need of justifying grounds, proves not only the possibility but the reality in beings who cognize this law as binding upon them.[16]

A nexus of principles emerges, each of which contains the other. Like freedom or autonomy for Kant, the death penalty is grounded on the logic of the unconditional. Man's "freedom" as rational being, understood as the

principle of something higher than life in Man, countersigns another figure of the unconditional in a sort of diabolical analogy: From Man's unconditional autonomy comes his subjection to the moral law, out of which emerges the unconditional figure of the death penalty as the sign of his rational destination—in other words, of his very freedom.

Having established this relation between the unconditionality of the moral law and the death penalty in Kant's argumentation, Derrida turns in Session Thirteen to Benjamin's exploration of the death penalty in the context of his "Critique of Violence." Reading Benjamin "with" Kant, Derrida demonstrates how the Kantian nexus of principles, clustered around a logic of the unconditional that legitimizes the death penalty as a "disinterested" sign of Man's super-sensuous vocation, is repeated with a difference in Benjamin. However, Derrida's turn to Benjamin via Kant does more than simply relate two thinkers, who would appear to be opposed, by demonstrating that they share a similar logic. Instead, Derrida places them into contact with one another without staking out a middle ground between them. To stake such a ground would be to immediately fall prey to a "simulacrum of identity"—the notion that there is one logic of the unconditional "shared" by two thinkers of different stripes. The result is a strangely passive gesture on the part of Derrida's commentary: By simply placing one alongside the other, Derrida allows their texts to resonate, to solicit each other. Both of them, as Derrida demonstrates, will introduce their own strategy of "*surenchère*," or "bidding up," with regard to the logic of the unconditional. Yet this staging of multiple gestures of "bidding up" begins, in Derrida's argument, to fragment the "simulacrum of identity" that engenders a specific relation to the unconditional ground that underpins the existence of the death penalty. Through a doubled reading of Kant and Benjamin, Derrida's seminar gestures toward a structure that makes both Kant's and Benjamin's respective arguments possible but that also might not yet be finished with making something else possible.

Focusing on a "figure of excess" in Benjamin's text, and on the unconditional scaffolding that makes it possible, Derrida's reading of "Critique of Violence" proceeds from the fascination the masses have for what Benjamin calls the "great criminal": a lawbreaker who fundamentally and radically contests the law's monopoly over violence. Benjamin's emphasis on the masses' fascination concerns two different components that make the "great criminal" such a focus of attention. The first is a fascination with the great criminal's act and the specific manner in which it exceeds the law. The second (which is Benjamin's primary focus) involves a fascination with the law's self-interest in its own defense by punishing the "great criminal"

with death. This second component is, in fact, a fascination with the death penalty. For Derrida, Benjamin's argument "links up" with the Kantian logic of the death penalty as a hyperbolic reaction to a hyperbolic crime, while grounding itself in a law that at the same time is paradoxically fully self-interested. That is, in applying the death penalty to the case of the "great criminal," the law, for Benjamin, reveals that it is interested primarily in its own self-preservation. Since, for Benjamin, law is the appropriation of violence, its monopolization, individual acts of violence threaten the law simply by challenging this monopoly, along with the means/ends structure that governs the juridical. As Benjamin puts it: "One might perhaps consider the surprising possibility that the law's interest in a monopoly of violence vis-à-vis individuals is explained not by the intention of preserving legal ends, but, rather, by the intention of preserving the law itself; that violence, when not in the hands of the law, threatens it not by ends that it may pursue, but by its mere existence outside the law."[17] Thus, Benjamin and Kant meet in Derrida's text at the apex of an outbidding that either condones the death penalty in in its pure disinterestedness (for Kant) or does the same in its pure self-interest (for Benjamin): "If violence, violence crowned by fate, is the origin of law, then it may be readily supposed that where the highest violence, that over life and death, occurs in the legal system, the origins of law jut manifestly and fearsomely into existence."[18] The death penalty's exercise over life and death, the most extreme and hyperbolic punishment the law can enact, is also where it comes into contact with its own violent, alegal, unconditional ground. The application of the death penalty, in Benjamin's argument, thereby crosses the border between the foundation of law and its most extreme application. In other words, the death penalty, for Benjamin, is a site that reveals the total imbrication of law-making and law-preserving violence.

What interests Derrida in this reading of Benjamin is not just the fact that a logic entirely opposed to Kant's grounds the "justification" of the death penalty in the "fact" of the law or in the defense of its monopoly on violence. Derrida is also interested in the multiple figures of fascination that result from this symmetrical counter-logic to Kant's notion of a disinterested death penalty. There is, first of all, a fascination with the death penalty itself, which in primitive societies, Benjamin claims, was explicitly disproportionate, violating jus talionis not in order to authorize a particular law but in order to reinvent the foundation of law itself. For Benjamin, the death penalty thus reveals that the monopolization of violence by the law in fact points to the law's origin as external to the juridical order it establishes. The very reason the law takes an interest in itself, in its own

self-preservation, is that it must continuously refer to the alegal, violent origin that first instituted it. As a result, it must defend itself against other claimants, such as the "great criminal," who would inaugurate, outside the juridical system that the law has set into place, other founding laws, other claims to a monopoly over the law's violent origin. In Benjamin's argument, the "great criminal" does more than transgress a specific law: He transgresses the principle of law itself, its very "right" to a singular, exceptional relation to its own violent act of foundation. The fascination of the masses with both the "great criminal" and the death penalty stems from the way these two entail a contestation over the alegal origin of the law.

Rather than side with, or join in, a contestation over the alegal foundation of law, Derrida focuses on how a variety of "figures of excess" begin to proliferate in and around the various forms of relation to this extralegal foundation Benjamin examines. Without privileging a specific relation to this alegal space, Derrida allows the proliferation of figures to disperse the purported unity of the unconditional ground they appear to encircle. At stake in Derrida's argument appears to be an attempt to solicit both thinkers—Kant and Benjamin—in an effort to think at once the condition of a relation to the unconditional and the contestation that results when this ground can no longer be identified as a unique or singular "vital center." Or it is as if, in Derrida's reading "between" Kant and Benjamin, any contestation over the law had to first of all challenge whether the basis of the dispute was not already exposed to a logic of iterability at the heart of the founding of the law itself. This iterability would entail both a radical inauguration, such as the self-grounding of the moral law in Kant or the violent imposition of the law in Benjamin, and a reference to a prior occurrence that always already deracinates the sovereignty, the unique singularity, of the founding act from its very inception. In Benjamin's text, this iterability induces a hyperbolic desire: the need to preserve a right to the law's unique or privileged relation to its own ground. This right also signifies the law's right to a monopoly over lawmaking violence, a monopoly that in turn engenders a properly hyperbolic figure within the juridical-political system it inaugurates: the death penalty. It is as though Derrida were engaged in a long detour, passing by way of the many "identity-effects" invoked by a fascination—whether Kant's, Benjamin's, the masses', or his own—with the logic of the unconditional, of which the "great criminal" and the death penalty would only be examples among others. As if the logic of surenchère or "bidding up" were itself being subject to a proliferation that multiplies the effects of this logic, without any assurances or guarantees of what will emerge out of this repetition. This is why Derrida spends so long in Ses-

sion Thirteen commenting on the multiplication of the "more than" ("*mehr als*") formulations in Benjamin's essay. Derrida professes his own kind of interest in the proliferation of these formulations throughout Benjamin's text, as if the proliferation itself, rather than the figures, were what was important: "*More than*, *mehr als*: this 'more than' this 'more [*le plus*],' this hyperbole, this summit of the comparative or this superlative is interesting in Benjamin's argument."[19] In Kant's and Benjamin's texts there are always at least two figures of radical sovereignty, always more than one, both seemingly grounded in the same logic of surenchère. While restaging the aporia of a relation to the unconditional that authorizes two very different notions of the death penalty, Derrida will go on to gesture, through this restaging, toward something that in the repetition allows the aporia to present itself anew. Whether this restaging adds yet another "figure of excess" to a proliferating array of figures or instead permits the glimpse of something other, an entirely different relation between figure and unconditional ground, remains initially deferred.

This deferral ends, however, by being confronted with one of the most hyperbolic moments in Benjamin's "Critique of Violence": his enigmatic reference at its conclusion to the notion of "divine violence." The aporia of a relation to the unconditional in Benjamin's essay takes the form of a need to articulate more precisely the distinction between law-preserving and law-making violence. Alluding to his own discussion in the second half of "Force of Law," Derrida suggests in the Death Penalty Seminars that Benjamin's reference to divine violence is the site where this aporia is articulated. However, I would argue that the notion of "divine violence" cannot be understood in the same way as other "figures of excess" such as the death penalty or the "great criminal," both of which are legible and are, for Benjamin, clear instances of the imbrication of law-making and law-preserving violence. In fact, Benjamin openly ponders whether one will ever be able to identify the precise form or figure divine violence takes: "For only mythic violence, not divine, will be recognizable as such with certainty, unless it be in incomparable effects, because the expiatory power of violence is invisible to men."[20] For Benjamin, mythic violence is the only recognizable violence because it enshrines violence into law. Divine violence, however, takes many forms, some of which make it appear as if it were its contrary: "Once again all the eternal forms are open to pure divine violence, which myth bastardized into law. Divine violence may manifest itself in a true war exactly as it does in the crowd's divine judgment on a criminal."[21] Insisting that all law-making and all law-preserving violence is "pernicious," Benjamin ends his text with a famously enigmatic claim that

points toward a doubling back of the logic of surenchère upon itself. Irreducible to both law-making and law-preserving violence, divine violence is exterior to both, unrecognizable in itself, yet still part of the hyperbolic "more than" structure that allows it to emerge. It is, in other words, still a feature of the relation between law and its alegal foundation. As the conclusion of Benjamin's essay insists: "Divine violence, which is the sign and seal but never the means of sacred dispatch, may be called 'sovereign' violence."[22]

Perhaps this further bidding up forces the term *sovereign* to undergo a mutation, allowing it to become as "unrecognizable" as the very divine violence Benjamin invokes in the last line of his essay. Yet since he defines divine violence as that which annihilates all law,[23] Benjamin does not immediately introduce a figure for it.[24] What emerges at the end of the essay instead of an example is an act of naming or designation. In "Force of Law," Derrida links the enigmatic ending of the "Critique of Violence" with Benjamin's earlier meditation on naming in his 1916 essay "On Language as Such and on the Language of Man." There, Benjamin articulates a transition from God's original creative speech act in Genesis to the bestowal upon Man of the capacity of naming (albeit without the capacity to create by naming): "God spoke—and there was. But this man, who is not created from the word, is now invested with the *gift* of language and is elevated above nature."[25] God's originary speech act brings the world into being, but it also bestows upon Man the capacity of naming as the means by which the world becomes known or communicable: "The absolute relation of name to knowledge exists only in God; only there is name, because it is inwardly identical with the creative word, the pure medium of knowledge. This means that God made things knowable in their names. Man, however, names them according to knowledge."[26] In short, the only genuinely creative act of nomination belongs to God, whereas once the language of God is relieved of its actuality in the divine, it becomes a form of knowledge, something communicable.

Yet even in this earlier essay, the relation between God's creative nomination and Man's capacity to name passes by way of a relation between law and nomination. For Benjamin, the birth of human language marks Man's capacity to name, only once the direct connection between name and thing has been sundered. That is, another dimension of Man's capacity to name takes shape only after the Fall, once good and evil, the problem of judgment, and all the elements of human language Benjamin identifies with the beginning of abstraction have entered the scene. This "abstract" dimension of language is, for Benjamin, irreducible to knowl-

edge: "The Tree of Knowledge stood in the garden of God not in order to dispense information on good and evil, but as an emblem of judgment over the questioner. This immense irony marks the mythic origin of law."[27] The mythic origin of law, then, is conceived here as a passage between two different forms of nomination: the one that belongs to God (in which name and thing are one) and the one that belongs to Man (in which this immediacy is broken).

I would argue, however, that human language, in Benjamin, nevertheless bears a trace of divine nomination. Toward the end of "On Language as Such and the Language of Man," Benjamin introduces a seemingly paradoxical claim that calls into question his focus on Man's language as essentially communicative: "Language is in every case not only communication of the communicable but also, at the same time, a symbol of the non-communicable. This symbolic side of language is connected to its relation to signs, but extends widely—for example, in certain respects to name and judgment."[28] While I cannot develop all that is at stake in Benjamin's insistence on the relation between naming and judgment here, it is clear that language, for Benjamin, maintains a relation to an exteriority that cannot be reduced to something already "there," already given in and by God's act of creation. This symbolic dimension of language offers something that cannot be mediated or imparted, which means that there is, in every act of naming, something that withdraws itself from enunciation. It is as if every name, insofar as it attempts to re-enact God's original unconditional act of naming, kept a secret, a reference to an anteriority from which it derives its capacity to name.

In "Force of Law," Derrida explicitly links this prior space of naming with Benjamin's later concept of "divine violence": "Is it not 'divine violence' that will always have come first but also given all the first names, by giving man the sole power of naming?"[29] Divine violence thus occupies a strange liminal space: Exceeding both law-making and law-preserving violence, it gestures toward a scene of "violence" that would have come first, that would have been anterior to them both. In the context of Benjamin's "Critique of Violence," divine violence interrupts all established law, while not yet founding another law. It therefore acts otherwise than as the "great criminal" who challenges the monopoly of law's mystic origin by staking a claim to that very source, becoming a pretender capable of speaking in its name. In short, divine violence acts differently than any other "figure of excess" in Benjamin's text, since in each case what is at stake is a contestation over a particular unconditional ground. In contrast, divine violence constitutes a strange form of "bidding up" since, as Derrida puts

it in "Force of Law," divine violence "*never takes place in a presence*. It is the moment in which the foundation of the law remains suspended in the void or over the abyss, suspended by a pure performative act that would not have to answer to or before anyone. The supposed subject of this pure performative would no longer be before the law [devant la loi], or rather he would be before a law [loi] still undetermined, before the law as before a law still nonexisting, a law still ahead, still having to and yet to come [une loi encore devant et devant venir]."[30] What Derrida calls here an "absolute performative" (to distinguish it from Austin's concept of the performative), would not yet have any conditions in place to ascertain its "felicity," to indicate its having been carried out or established.[31] Divine violence, thus, has the structure of the future anterior, suspended in a place where the absolute distinction between law-making and law-preserving violence no longer holds and where divine violence takes the form of an "absolute performative" whose presence has not yet arrived, much like the secret at the heart of every name.[32]

What is significant in this gesture toward the "future anterior" of divine violence, however, is the way that the "bloodlessness" of divine violence (for Benjamin repeatedly insists on the fact that divine violence does not shed any blood) begins to once again mimic the logic that leads Kant to affirm the death penalty in the name of that which exceeds man's natural life.[33] If the mythological violence of the law is exercised against mere life, sacrificing it in the name of something that transcends life, divine violence, according to Benjamin, sacrifices life for the sake of the living, beyond both law and judgment: "Mythic violence is bloody power over mere life for its own sake; divine violence is pure power over all life for the sake of the living."[34] This is what distinguishes divine violence from mythic violence: Beyond mythic violence's sacrifice of life for its own sake (i.e., for the sake of the power of mythic violence itself), divine violence values life for the sake of a different destination of what is "more than," over and above, life. It values life, according to Benjamin, for the possibility of Man's *being-just*, for the justice of his life and for the justice of life itself. This is why divine violence is always, according to Benjamin, the most just, the most historic, the most revolutionary, and as Derrida adds "the most decidable or the most deciding."[35] It is "the most deciding" because, paradoxically, divine violence "does not lend itself to any human determination, to any knowledge or decidable 'certainty' on our part. It is never known in itself, 'as such,' but only in its 'effects' and its effects are 'incomparable.' They do not lend themselves to any conceptual generalization."[36]

Thus, we are once again faced with two different surenchères, seemingly symmetrical, two different forms of "bidding up," two different relations to the unconditional that gives these logics their force and efficacy. Yet what appears to desymmetricalize this relation is the even more audacious gesture at the end of Benjamin's essay toward a form of violence that has no figure, no present name under which it falls. The line that concludes the "Critique of Violence," cited above, and that I cite here again, moves from the juridical-political to the problem of nomination Benjamin addresses in "Language as Such and the Language of Man": "Divine violence, which is the sign and seal but never the means of sacred dispatch, may be called 'sovereign' violence."[37] Commenting on this line in "Force of Law," Derrida links this conception of "sovereignty" to the power of nomination itself: "It names itself. Sovereign is the violent power of this originary appellation. Absolute privilege, infinite prerogative. The prerogative gives the condition of all appellation. It says nothing else, it calls itself, therefore, in silence. Nothing resonates, then, but the name, the pure nomination of the name before the name. The pre-nomination of God—here is justice in its infinite power. It begins and ends in the signature."[38] In this ostensibly even more radical gesture of "surenchère," we seem to have returned to something approximating the "originary" naming act of God in Benjamin's "On Language as Such and the Language of Man." Except that here the dividing line between nomination and "pre-nomination" no longer holds, nor does the division between law-making and law-preserving violence. Unconditional as it is ("it names itself"), this radical act of self-nomination cannot dispense with an opening at the same time to a *pre*-nomination, which would be both an opening toward justice and the threat of what Derrida in "Force of Law" and elsewhere calls "the worst": the possibility of a "bidding up" toward an even more radical, more sovereign form of violence.

And yet, in the end, Benjamin's purely nominal definition of divine violence that concludes the "Critique of Violence" ("it may be called 'sovereign' violence") suggests something that does not yet have a name, something that has not yet been given its proper name, and would have to be called "sovereign" for lack of any other designation. By default, as it were. As if with sovereign or divine violence we had returned to a moment of creative nomination that sets in place what it names. Or, alternatively, it is as if the namelessness, the figurelessness of divine violence required a counter-signature, a kind of counter-nomination. It is perhaps the secret of this name that Derrida gestures toward in his reading of the various "figures of excess," including the death penalty, and their relation to the

unconditional. Derrida's reading takes place "between" Kant and Benjamin, without any assurance that the name "divine violence" is, in fact, a proper one. In any case, it remains something short of a premise or, for that matter, a "principle." Nonetheless, it inaugurates a strategy that will have taken us through a long detour, if only in order to sign nothing but the unconditionality of a promise.

NOTES

1. There have been several disturbing recent examples of "botched" executions due to a lack of supply of the drugs and toxins used to administer lethal injection. Recent victims include Dennis McGuire in Ohio, executed January 16, 2014, who took twenty-five minutes to die, and Clayton Lockett in Oklahoma, executed April 29, 2014, who, after an experimental solution was used in place of the standard drugs, took forty-three minutes to die. More information about these and similar cases can be found at the Death Penalty Information Center at deathpenaltyinfo.org.

2. On March 22, 2015, the governor of Utah, Gary Herbert, signed a bill making firing squads the means of execution in the event that the state is unable to obtain the drugs required to administer lethal injections.

3. Derrida first uses this term of "scaffolding" in volume 1 and throughout the Death Penalty Seminars, referring initially to the "logocentric, logonomo-centric scaffolding in which the death penalty is inscribed or prescribed." See Jacques Derrida, *The Death Penalty*, vol. 1, trans. Peggy Kamuf (Chicago: University of Chicago Press, 2014), 23.

4. In an interview with Élisabeth Roudinesco, Derrida makes the following claim: "Never, *to my knowledge*, has any philosopher, *as a philosopher*, *in his or her own strictly and systematically philosophical discourse*, never has any philosophy *as such* contested the legitimacy of the death penalty." See Jacques Derrida, *For What Tomorrow . . .* , trans. Jeff Fort (Stanford, Calif.: Stanford University Press, 2004), 146.

5. Derrida ventures the following "hypothesis" in the First Session of volume 1 of *The Death Penalty*: "If the history of the general possibility, of the largest territory of the general conditions of possibility of epic, poetic, or belle-lettristic productions (not of literature in the strict and modern sense) supposes or goes hand in hand with the legitimacy of the legality of the death penalty, well then, on the contrary, the short, strict and modern history of the institution named literature in Europe over the last three or four centuries is contemporary with and indissociable from a contestation of the death penalty, an abolitionist struggle." See Derrida, *Death Penalty*, 1:30.

6. Carl Schmitt, *Political Theology*, trans. George Schwab (Chicago: University of Chicago Press, 1985), 5.

7. Ibid., 6.

8. This term is used throughout both volumes of *The Beast and the Sovereign*. Derrida defines it as "a bidding up that attempts to change the sense of *majesty* or of *sovereignty*, to displace its sense, while keeping the old word or claiming to restore its most dignified meaning." See Jacques Derrida, "Majesties," in *Sovereignties in Question*, trans. Thomas Dutoit and Outi Pasanen (New York: Fordham University Press, 2005), 117.

9. Derrida analyzes Hugo's abolitionist argument throughout volume 1 of *The Death Penalty*. See especially Session Four, 97–122.

10. Jacques Derrida, *The Death Penalty*, vol. 2, trans. Elizabeth Rottenberg (Chicago: University of Chicago Press, 2017), 17.

11. Ibid., 18.

12. Ibid., 21.

13. See especially Session Six of Derrida, *Death Penalty*, 1:138–65.

14. Immanuel Kant, "On the Right to Punish and to Grant Clemency," in *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1996), 104–10.

15. Immanuel Kant, *Critique of Pure Reason*, trans. Paul Guyer and Allen W. Wood (Cambridge: Cambridge University Press, 2009), 245–66.

16. Immanuel Kant, *Critique of Practical Reason*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1997), 42.

17. Walter Benjamin, "Critique of Violence," in *Selected Writings*, vol. 1, ed. Marcus Bullock and Michael W. Jennings (Cambridge, Mass.: Harvard University Press, 1999), 239.

18. Ibid., 242.

19. Derrida, *Death Penalty*, 2:48.

20. Benjamin, "Critique of Violence," 252.

21. Ibid.

22. Ibid.

23. Ibid. In fact, Benjamin makes clear that what primarily differentiates divine violence from mythic violence is its radical destruction of the law: "This very task of destruction poses again, ultimately, the question of a pure immediate violence that might be able to call a halt to mythic violence. Just as in all spheres God opposes myth, mythic violence is confronted by the divine. And the latter constitutes its antithesis in all respects. If mythic violence is lawmaking, divine violence is law-destroying; if the former sets boundaries, the latter boundlessly destroys them" ("Critique of Violence,"249).

24. Divine violence, though it is "law-destroying" according to Benjamin, should not be confused with "revolutionary violence" of the kind Benjamin analyzes in the case of the general strike. While it is true that the general

strike appears to come closest in Benjamin's text to an "example" of divine violence because it subtracts itself from the normal means/ends structure that governs the juridical sphere (going as it does beyond the mere legal negotiation of demands, seeking to instead overturn the existing juridical-political order), it must not be forgotten that the "right to strike" is nonetheless grounded in the juridical order itself. Benjamin, in fact, treats the strike as the sole remaining legal form of violence not monopolized by the state. Nor should it, as Slavoj Žižek suggests, be reduced to the "heroic assumption of the solitude of decision," or to a case of what occurs when "those outside the structured social field strike 'blindly,' demanding and enacting immediate justice/vengeance." Divine violence must be understood instead (as Žižek suggests, but does not fully develop) in terms of an Event in which both the notions of "decision" and "sovereignty" have undergone a mutation. See Slavoj Žižek, "Divine Violence," in *Violence* (New York: Picador, 2008), 202.

25. Walter Benjamin, "On Language as Such and the Language of Man," in *Selected Writings*, vol. 1, ed. Marcus Bullock and Michael W. Jennings (Cambridge, Mass.: Harvard University Press, 1999), 67–68.

26. Ibid., 68.

27. Ibid., 72.

28. Ibid., 74.

29. Jacques Derrida, "Force of Law," in *Acts of Religion*, ed. Gil Anidjar (New York: Routledge, 2002), 262.

30. Ibid., 270.

31. J. L. Austin, *How to Do Things with Words*, ed. J. O. Urmison and Marina Sbisà (Cambridge, Mass.: Harvard University Press, 1962).

32. This notion of "suspension" in the eruption of divine violence must be distinguished from the suspension of the law, where the law remains in force without being applied, which Giorgio Agamben analyzes as the history of the State of Exception. What is "suspended" in the case of divine violence is precisely violence's lawmaking capacity. See Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago: University of Chicago Press, 2005).

33. Benjamin insists that divine violence is both "lethal without spilling blood" and expiatory without bloodshed, "for blood is the symbol of mere life." See Benjamin, "Critique of Violence," 249–50.

34. Ibid., 250.

35. Derrida, "Force of Law," 291.

36. Ibid.

37. Benjamin, "Critique of Violence," 252.

38. Derrida, "Force of Law," 293.

CHAPTER 7

Calculus

Kas Saghafi

The Game

"What is *at stake* or *in play* [en jeu]" with the death penalty?[1]

What is a game (*jeu*) and what does a game have to do with the death penalty? Derrida refers to a game, the game of the goose (*le jeu de l'oie*), in the Eighth Session of the second year of the Death Penalty Seminars. A board game of uncertain origins that has appeared in myriad variations of rules and illustrative designs, the game of the goose has been played in Europe for several centuries.[2] The game is played on a spiral shaped board consisting of sixty-three spaces, with four differently colored pieces, often in the shape of a goose. Pieces are placed on the starting space at the outside of the spiral and each player's piece is moved from one square to the next square according to the throws of one or two six-sided dice. But what kind of game is the game of the goose and what does it represent? Does this game have rules and are these "rules of calculation [*règles de calcul*]?"[3]

If Derrida plays around with the game of the goose in his seminar, he tells us, it is because this game is a game in which "all the figures of the same question 'What is man?,' 'What is proper to man [*le propre de l'homme*]?'

would appear successively on a track, thus in a narratable history."[4] In Session Eight of the second year Derrida further emphasizes that the question of the death penalty is "none other than the question of the human" and inevitably leads to the questions "What is man?" and "What is proper to man?"[5] In playing the game, he explains, "one would jump from square to square. . . . One would spend a longer or shorter time on one of the squares (what is proper to man is language, *logos*, reason, or else law, or else politics, or else freedom, or else responsibility, or else sovereignty, or else laughter, or else tears, or else the experience of death, or else time as such, or else right, or else modesty, or else clothing and home, or else technology, etc.)."[6] Among the squares would be the death penalty, Derrida further appends, "a figure for 'what is proper to man' and it would have, like all the other figures, a relation of solidarity, of essential concatenation, with all the other traits, all the other figures of what is proper to man, but also a relation of metonymy or synecdoche with the other traits or figures or predicates of what is said to be 'proper to man.'"[7] Indeed, "what is proper to man, the essence of humanity" would be defined by "the rational and calculated possibility, the possibility as power to *decide* sovereignly, to make the decision to *make die* the other who is deemed responsible and guilty, and to claim to answer for this decision in a responsible way, to claim to give an account and justify it with reason."[8]

But since the square of the death penalty would be just one square on "a circular path," then "the history of that thing or those things that are proper to man would be finite, so to speak; it would have exhausted its possibilities."[9] As Derrida explains: There would be "a finite series of squares, of given responses in the finite course of a given history, thus in a history whose circle was closed, without future."[10] In this game with rules, "history is closed, if not at its end."[11] This is why Derrida says he played around with the figure of the game of the goose. What is interesting about the game is "not only the seeming multiplicity of squares or places, . . . not only the idea of the rules of a game," not only the fact that "the game itself would be one of the things that was proper to man," but that "this game presupposes a *course* [parcours] resembling a history, a course resembling the course [*au cours*] or the coursing [*à la course*], the curriculum [*cursus*] of a history that gives rise to knowledge and narration. And it's this history, this course, this narrative that would be closed."[12] The squares may be numerous, Derrida remarks, but finite in number. This is "a combinatory series whose possibilities are finite."[13] "There is a history, but it is finite."[14] At the end of the session Derrida wonders whether there is "a way out of the game."[15] Would getting out of the game involve calculation or play?

However, like the death penalty, the game of the goose is a game without future since all of its paths lead back to the same spot. Derrida states that even if the square to the death penalty were to be removed from the game, the possibility of the death penalty (as possibility and not as act) would remain.[16]

Calculation

The death penalty calculates.

But calculation always calculates with some incalculable. Derrida writes: "If that which is subject to calculation were calculable, if calculation were not always dealing with the incalculable, there would never be any problem. There would not be any problem of criminal law or of the death penalty if calculation calculated what is calculable, calculated with what is calculable."[17] It is Derrida's belief, as articulated in Session Six of *The Death Penalty Seminar* volume 2 that calculation is always "provoked, put in motion, by what is itself not simply calculable but remains properly incalculable."[18] Thus it is always the incalculable that is subjected to calculation.[19] Moreover, a problem or crisis of calculation and hence the responsibility of a decision only arises where "we no longer know, we do not yet know what 'calculation' means."[20] The death penalty is a calculation; it involves a calculation. We could venture with Derrida to say that the death penalty is a calculus (*calcul*), a calculus of punishment or retribution.[21]

Apart from its most common designation as a branch of mathematics invented in the seventeenth century by Leibniz and Newton involving or leading to calculations known as the infinitesimal calculus, a calculus can also refer to a method of calculation or the means of arriving at an end. Its Latin etymology, meaning pebble or small stone, refers to a stone used in reckoning on the abacus or counting board as well as to a concretion, usually of mineral salts around organic material found especially in hollow organs or ducts within the body. In conventional usage the phrase "a calculus of. . . ," as in, for example, a calculus of power, a calculus of risk, or a calculus of suffering, indicates a particular method of calculation or reasoning, the calculation or appraisal of the degree or amount of what is being calculated. For example, Jeremy Bentham's calculus of pleasure, the famous hedonic calculus, holds that the moral rightness or wrongness of an action is a function of the amount of pleasure or pain that it produces.[22] What Derrida calls "the economy of the death penalty" is a calculus, a calculus involving the calculation of punishment and retribution. The death penalty is the calculation of a penalty assessed for

a wrong, the punishment deemed equivalent to a crime committed, retribution in exchange for a crime. This punishment has its roots in talionic law, a law that prescribes a certain calculation and follows a certain reasoning.

In the opening pages of Session Six, Derrida declares that the question of the death penalty is "the question of reason, of reason in general."[23] The death penalty is a matter of reason itself, reason as calculation, reason as a "calculating force [*puissance*]."[24] It is nothing other than the "blind calculating drive of a calculation that presents itself as reason itself."[25] The death penalty is a question of reason, of reason as "*ratio*, if not *logos*" of "giving reason," of "rendering reason," of "giving an account [*logon didonai*, *reddere rationem*]."[26] Criminal law is thus a *ratio*, an accounting.

More specifically, the question of the death penalty is "the question of reason as principle of reason."[27] As is well known, Heidegger in his lecture course of 1955–1956, during the course of an analysis of Leibniz's principle of sufficient reason recalls reason to its Latin lexicon of *ratio*, which signifies an account, a calculation, the account to be given or that has been given. It is Heidegger who introduces calculation into a rendering of Leibniz's principle of sufficient reason: "Every thing counts as existing when and only when it has been securely established as a calculable object [*ein berechenbarer Gegenstand*] for our cognition."[28] In order to translate *ratio*, the German language brings together the language of (reckoning) calculation (*Rechnen*) and the language of law or justification (*Recht*, *richtig*, etc.). This, Derrida writes, suggests that there is an "essential affinity between law and calculation, between law and accounting, being-guilty or being-responsible according to law, before the law, as being-countable."[29] What is involved is "some accountability of the countable," "some reckoning (*to account*, *to render account*, *to account for*, *to be accountable* [in English in the text])."[30]

Heidegger associates *ratio* with reason, *Vernunft*, and emphasizes that the principle of reason is the supreme fundamental principle of Reason. It is this interpretation of reason, he shows, that eventually leads to "the technocentered rationality of modern times," modern technology and, ultimately, to the atomic bomb. As he explains in *Der Satz vom Grund*, "Being is experienced as ground/reason [*Grund*]." The latter is interpreted as *ratio*, as an account, thus making human beings, the *animal rationale*, creatures that require accounts and give accounts.[31] For Heidegger, humans are "the reckoning creature."[32] This is how, Heidegger suggests, Greek thinking is translated and thus converted into representation.

Calculating reason as judicial reason "insofar as it is dominated by the law of exchange and the law of the talion" is perhaps, Derrida speculates, a

"mercantile reason."[33] It is as if commercial law were not simply "one law among others but the quasi transcendental essence of law."[34] All law would then be commercial law, in essence commercial, mercantile.[35] Heidegger associates the essentially calculating function of this reason as principle of reason with the justificatory function of law (*Recht*, *rechtfertigen*, *richtig*) with the rectitude, the precision or the correction of the law, as if there were "a congeniality, a common filiation and foundation" of law and calculation.[36] Law, then, would be calculability.[37]

Once there is calculation in matters of criminal law, the talionic law, which is bound up with the calculation of an exchange, an equivalence, or a substitution, is never far behind. Derrida calls the talionic law, *jus talionis*, the law of exchange of an eye for an eye, a tooth for a tooth, the "calculating principle" of the death penalty.[38] Without presuming to know what calculation means or what exchange or calculable substitution mean—even though in an aside he provides a hint by saying "all calculation has to do with the spacing of time, in the end, the economy of time"—Derrida proceeds to discuss the relation of calculation to the talionic law.[39] The Latin word *talion*, which comes from *talis*, "such," and which refers to a quality as in "such a wrong," "such a punishment," "such a crime," comes to designate in talionic law a passage from quality to quantity. In the seminar, Derrida refers to an article by Father Adrien Schenker of the Biblical Institute of Fribourg who, in an analysis of a passage from Exodus and of the biblical uses of the word *kōper*, establishes that the word designates "ransom" or "compensation," "the price to be paid in exchange, a calculable substitution, a transaction in return in order to buy back or redeem, remunerate, indemnify."[40] What is carefully calculated, Derrida notes, is "a price scale."[41] Derrida adds that it would be necessary to articulate Schenker's study with the Greek word for *kōper*, which is *lutron*, *lutra*, signifying a means of deliverance, the price of a ransom, a compensation, a recompense.[42]

So, the death penalty calculates. But what does the death penalty seek to calculate? Capital punishment is the calculation of a penalty, a penalty that seeks to pay for a damage or to repair a wrong. The punishment is in the form of a recompense, a payment that is supposedly equivalent to the wrong incurred. The death penalty calculates. It is the project of a calculation, a calculation that is indissociable from a decision. What Derrida hears in the phrase "condemned to death" is precisely a calculating decision—a decision and a will to master the date and time of death.[43] The death penalty calculates. The death penalty supposes the possibility of calculating and mastering the instant of death—the very limit between life

and death. The death penalty is the "automatic calculation of a mechanism, of some calculating machine," a program, a calculating project whose goal is mastery over time, over the future.[44]

It is not by chance that Leibniz, the inventor of the formula of the principle of reason, *nihil sine ratione* (nothing is without reason), was also the inventor of life insurance (*Lebensversicherung*).[45] For what is life insurance but that which guards against accidents and provides protection against occurrences that may happen in the future? This fact or happy coincidence is mentioned by Heidegger, who wants to define scientific calculation as "a system of insurances, an insurance-generating machine."[46] One can interpret law and the death penalty, Derrida comments, as "one of the modalities" of "life insurances and of information put in the service of life insurance."[47] Indeed, "the entire history and especially the modern history . . . of the death penalty, of the criminal law that includes the death penalty" could be interpreted as "a history of insurances, social insurances, or even social security."[48] In fact, Heidegger associates the primary character of "human existence [*Dasein*]" with "the work of safeguarding life [*Die Arbeit an der Sicherstellung des Lebens*]," which must be constantly secured.[49] An investment in the death penalty, then, is an insurance policy safeguarding the body politic, protecting it against unexpected losses. With an interest in calculating its salvation, the body politic will continue to accept a certain measure of sacrifice in order to ensure its survival.

Ever since Beccaria or Rousseau, what has mattered has been whether the best social contract, "the best social life insurance," should or should not inscribe the death penalty. In deciding on the best social contract, it is a matter of knowing if it prescribes or proscribes the death penalty. As Derrida observes, almost all arguments for or against the death penalty "are constituted against this horizon of insurance," in other words, against this "calculation of probabilities."[50] According to Derrida, what is interesting about this interpretation of the principle of reason—everything that is (being) has a reason—is that it consists of interpreting beings as objects. What lends itself to calculation is the object, "the figure of the object," and what is calculated is "objectivated, objectified."[51] Thus the modern era has determined being as objectity, as *Gegenständigkeit*—the condition of possibility of the object.

Noting that in order to more fully explore the stakes and ramifications of this view it would be necessary to turn to a close reading of *Der Satz vom Grund*, in the seminar Derrida limits himself to a couple of observations or clarifications. What Derrida finds most curious is the following: How can Heidegger, as someone who thinks the principle of reason as calculation

and as principle of law, avoid speaking of the calculation of punishments and the calculation regarding life and death?[52] Derrida expresses surprise that Heidegger never speaks of punishment and pardon, unless this may have been because he dismissed capital punishment as a juridical problem secondary to and derived from an originary being-toward-death. Perhaps this was because in Heidegger's view, the very regional and very dependent question of the death penalty could be posed only after thinking being-toward-death, the thinking of which was his main concern.

In his examination of the principle of reason in *Der Satz vom Grund* Heidegger determines that it is "no longer a matter of thinking being from beings," but rather as being [*Sein*], that is, as ground [*Grund*]."[53] The book, which is entirely a meditation on *Grund*, foundation, principle, and axiom, poses the question "What founds or grounds reason?" In other words, where does reason derive its foundation? Traditionally ground has been understood as that to which explanation refers back, that from which explanation proceeds or the foundation for a true assertion. The ground constitutes, produces, engenders, accounts for; it is the common root, the condition of possibility.[54] Heidegger's argument in *Der Satz vom Grund* runs as follows: The history of the West is a history of thinking reason, not that of Latin rationality, of the objective sciences, but a history of that which thinks being as ground. Heidegger determines being as ground (*Sein* as *Grund*) and not as *ratio* or cause (*Ursache*) or rational grounding (*Vernunftgrund*), on the basis of a thinking of *logos*, of *legein*, as assembling that lets beings before us be.[55] Ground, in this view, is a noncausal, nonobjective grounding, and something more like "a ground without ground, a *Grund* that is also an *Ab-Grund*."[56] Being (and not being) is reason. Thus, for Heidegger, Being and *Grund* are the Same, which also means Being=*Ab-Grund*, abyss, both reason and without reason.[57] Insofar as it grounds, being has no grounding, the grounding is necessarily ungrounded.[58]

Thus, Heidegger submits, any positing or founding (*Setzen*) of a ground is a leap (*Satz*). This is what relates not only "the *Setzen*, positing, positioning, and proposition (*Satz*)" but also "the leap (*Satz*)."[59] Heidegger wonders whether, with the leap, we do not also fall into "the fathomless abyss [*ins Bodenlose*]."[60] He responds both in the affirmative and the negative. *Yes* because it is impossible to lead being back into a basis (*Boden*) in the sense of beings, and *no* because "for the first time, being is finally thought as being," as that which gives the measure (the *Mass-Gebende*) and not as a being.[61] Thinking has a duty, Heidegger writes, to "measure itself against, or take its measure from this gift of the measure, this given measure [*muss*

sich dieser Mass-Gabe anmessen]."[62] However, "it is not possible for us to take this measure for ourselves" through any calculation, accounting, computation, or measurement.[63] We "cannot calculate the gift of this measure."[64] We cannot measure—and "that's where there is a leap (*Sprung*)."[65]

This gift of the measure "becomes for us incommensurable, immeasurable, immense, measureless [*démesuré*], incalculable, outside the range of any rational calculation."[66] In other words, "the o-rigin of calculating reason is a-rational [*a-rationelle*] and incalculable."[67] This means that being is not supported by a foundation upon which it rests but "reposes without repose since it rests on nothing that is . . . it is supported by no foundation, since it is a ground without ground (both *Grund* and *Abgrund*, *Abgrund* because *Grund*), indissociably."[68] The ground is thus without ground. The conclusion that we could draw from this is that reason as calculation rests on, is based on, an abyss, *Ab-grund*. And "calculating rationalization" is an attempt "to dissimulate the abyss of the incalculable in the depth [*fond*] of the calculable, a historical attempt to reason away what remains unfathomable and incalculable in the origin of this measuring and measured reason."[69]

Death is this "as yet unthought gift" of the measure of the unmeasurable, of the unfathomable.[70] Playing with the sense of *Gabe* as the gift and the measure, Heidegger writes that death is the measure because it gives the measure and as giving the measure it is itself not measurable. What does "to give the measure" mean?" Derrida asks. This leads him in the direction of another passage, in which elaborating on "the relation between "*ratio*, *Grund*, *Vernunft*, Heidegger recalls the origin of *ratio*, namely *reor*. *Reor* means to reckon, to calculate."[71] Heidegger goes on to comment that *ratio* is connected with the verb *reor*, to consider something as that with regard to which I consider something as something. "This broad sense of the verb reckoning (*Rechnen*) also determines the sense of the word *calculation*," of mathematical calculus, which Heidegger refers to in the last lecture of *Der Satz vom Grund* and writes in Latin (*Kalkül*).[72]

Excursus: A Nonmathematical "Calculus"

In Lecture 13 of *Der Satz vom Grund*, making a reference to Hölderlin's "Remarks" on his translations of Sophocles, Heidegger notes that there is another sense of calculus, the use of calculus "in a deeper sense."[73] He briefly alludes to what he calls "a non-mathematical sense" of the word *calculus*, speaking of "balance," a balance belonging to scales, but he does not pursue this reference to the calculus any further.[74] Heidegger is, of

course, referring to Hölderlin's "law [*Gesetz*]" of poetry, which the poet calls the "calculus [*Kalkul*]." *Kalkul* can ordinarily be rendered as a calculation, an assessment, or an estimation. In the "Remarks" (on Oedipus and Antigone), Hölderlin makes references to a "calculable law [*kalkulables Gesetz*]" or "lawful calculation [*gesetzliche Kalkul*]." In the opening paragraphs of "Remarks on 'Oedipus'" (Anmerkungen zum Ödipus), Hölderlin calls for a "lawful calculus," writing that, compared with those of the Greeks, other artworks lack reliability.[75] The former have been judged according to the impressions that they make rather than according to their lawful calculus. For Hölderlin, the *Kalkul* describes his poetic logic (*poëtischer Logik*), which operates by way of "balance [*Gleichgewicht*]." *Kalkul*, then, refers to the balance and equipoise of the work of art, the law or calculus of the work appearing in the work's equilibrium.

According to Jean-Luc Nancy, it is the poet whose task is calculation. The poet's task is "above all a calculation [*un calcul*]," for the poet must measure and calculate time in view of precision and exactness.[76] In contrast to the philosopher who has to elaborate a system and whose object is synthesis, "the poet has to touch upon an absolute point of exactitude, which is more the stake of a calculation than that of a construction, production, or begetting."[77] "Exactitude," in Nancy's words, "is the proper of calculation."[78] But calculation, he points out, is "not a deduction; it is a sighting [*visée*]. In sighting the unity of the whole [*pour viser l'unité du tout*], there is no measure outside of the sighting itself."[79] "The *kairos* of the poet" is "the whole itself."[80] "Measure [*la mesure*]," Nancy adds, "is the word, the word and the motif, upon which Hölderlin's thought and poetry very exactly intersect—sharing themselves (*sich mit-teilen*) in every sense of the term."[81]

The Noncalculable or Incalculable of Punitive Justice, or Beyond Calculation

In the second year of the Death Penalty Seminars Derrida has recourse to Theodor Reik, whose text *The Compulsion to Confess*, is employed as representative of psychoanalytic arguments regarding the death penalty. (Derrida will later go on to remark that, for him, what is "at issue is a history of reason and the mutation that something like psychoanalysis might inscribe in it—which is not an irrationality but perhaps another reason.")[82] In Session Seven Derrida summarizes Reik's assessment of the death penalty, which the latter treats as a "pulsional law."[83] For Reik, "the whole supposedly rational, rationalizing, . . . the whole of pure judicial rationality that tries to justify talionic law" is "a belated rationalization" and "an intellectual

alibi."[84] Derrida explains that for Freud and Reik, which he treats together as a couple, the unconscious is governed by talionic law. And this law, as a law of the market and exchange, is inflexible and unforgiving.

In the same session of the seminar Derrida turns to Kant's *The Metaphysics of Morals* as he does in several other sessions in the second year. In the "Appendix" to "The Doctrine of Right" Kant describes "punitive justice [*Strafgerechtigkeit*]" as "outside of any calculation of interest of means toward the end, thus of any calculation of interest."[85] Derrida points out that, for Kant, calculation is disinterested: "If it just calculates in order to apply the law of talion, this calculation is in no way a calculation of interest. . . . It is absolutely disinterested; it obeys no pathological motivation (in the Kantian sense), no psychological, passionate or pulsional motivation."[86] What differentiates "Kant's pure reason from every other reason of penal law," Derrida remarks, "thus resisting both Heidegger and Freud-Reik," is precisely this disinterestedness.[87] It resists Heidegger when he interprets the principle of reason as calculation. When Kant speaks of "an Idea of punitive justice or a pure talionic law that gives the idea of calculation but is not itself originally calculable" he may be thinking of what exceeds calculation: "Pure penal reason, here, the Idea of a civil constitution among human beings, implicating as it does the concept of some punitive justice, is not a calculating reason that would seek to reassure, or would be in the service of an insurance project."[88] Derrida clarifies that for Kant "punitive justice goes beyond all calculation as relation between means and end."[89] "Even capital punishment does not answer to calculation and hence serves no purpose, and must serve no purpose; it does not insure or reassure in the least; it is not reassuring, and in this it is worthy of man and the dignity of man; it even honors man."[90] What we are dealing with, Derrida notes, is "a pure reason that follows the principle of reason . . . but which turns it into something other than a principle of calculation in the service of a motivated interest that would be in the interest of insuring life and being."[91] "And this," Derrida adds forcefully, "risks disorganizing the whole epochal or historical schema that Heidegger lays out in *Der Satz vom Grund*."[92] By the same token, "if punitive justice as pure Idea is not and must not be in the service of a calculation of insurances, it is also not in the service of a drive, of a pulsional, psychological and unconscious talionic law."[93] In Derrida's estimation "the *jus talionis* of justice that Kant is talking about is distinct from the *jus talionis* that Freud and Reik are talking about, in the way that *pure form* is distinguished from any *content*."[94]

In his defense of the rigor of Kant's thinking, Derrida notes that "in order to do justice here, never lose sight of the two distinctions that Kant

takes to be decisive, namely 1. the distinction between form and content as well as 2. the distinction between non-calculation of interest by punitive justice (the non-calculable or incalculable of punitive justice, including the death penalty) and the pure calculation of the talionic law."[95] Even though Kantian discourse is not immune from psychoanalytic questioning, in Geoffrey Bennington's estimation, Kant still provides the "most rigorous philosophical argument *in favour* of the death penalty (i.e. Kant's argument in the *Metaphysics of Morals*)."[96] In his "Ex Lex" Bennington strongly argues that "any attempt to produce a properly philosophical argument" for the abolition of the death penalty "will have to confront that defense and that rigor."[97]

The Beyond-Measure

In the Sixth Session of the second year of the Death Penalty Seminars Derrida comments on a passage from the already mentioned thirteenth and last session of Heidegger's course entitled "Der Satz vom Grund" with the death penalty as his "frame of reference [*mise en perspective*]."[98] Yet Derrida's concern, rather than the death penalty, is with death, specifically with "what is *at stake and in play* [*se joue*], what is involved, what is given in death, what is posed in death, be-tween calculation and the incalculable, between the Game [*Le Jeu*] according to the rule of the game as rule of calculation [*sous la règle de jeu comme règle de calcul*], and another thinking of the Game without measure [*Jeu sans mesure*], without calculation and without rule of calculation."[99] For Derrida, the question of the death penalty, including its "calculating principle of *jus talionis*," has its place between the calculable and the incalculable.[100]

Derrida begins the next session by asking "What happens when a measure is given?" Measure belongs to the order of the calculable.[101] Likewise, reason or the principle of reason can be given, but what gives reason or the principle of reason might not belong to rational calculation. As gift, "the gift of measure (*Mass-Gabe*)" might therefore be without measure.[102] In his comments during an earlier session from the previous year (Session Ten) Derrida remarks that he is tempted to put a lot of emphasis on the expression "beyond measure [*démesuré*]" since the death penalty is "a matter of an excessiveness [*démesure*], a penalty without proportion, without commensurability, without any possible relation that is proportional with the crime. With the death penalty, we touch on an alleged calculation that dares or alleges to incorporate the beyond-measure and the infinite and the incalculable into its calculation."[103] "If there is a scandal," Derrida continues in his

comments, "the unheard-of, unique scandal of the death penalty" is its "excessiveness, the fact that it cannot be measured, 'commensured,' so to speak, with any crime. The death penalty dares to claim to measure the beyond-measure in some way."[104]

The death penalty calculates. But we have shown that calculation is an affair of the in-calculable, the without measure, the incommensurable. Calculation always calculates with some in-calculable. The in-calculable, though, is not at all something that is noncalculable, since the in-calculable does not lie entirely outside of calculation. What we normally refer to as incalculable is something that is factually not possible to measure or to count. The in-calculable, however, is not completely heterogeneous to the calculable. Even if I cannot actually calculate it, the in-calculable may still remain calculable. What the death penalty seeks is to incorporate the beyond-measure, the incalculable, into its calculation. However, what it claims to be able to determine, what it claims to measure—the incommensurable, the in-calculable—is an excessiveness beyond measure. The death penalty wants to take the measure of what cannot be measured, but death is "the gift of a measure" of the unmeasurable.[105] No crime can ever be equated with, or made equivalent to, the ultimate penalty meted out—the penalty of death.

NOTES

Portions of this essay were first presented at the American Comparative Literature Association, New York, March 20–23, 2014.

1. Jacques Derrida, *Séminaire: La peine de mort*, vol. 2, ed. Geoffrey Bennington and Marc Crépon (Paris: Editions Galilée, 2015), Sixth Session, 187; *The Death Penalty*, vol. 2, trans. Elizabeth Rottenberg (Chicago: University of Chicago Press, 2017), 136.
2. Scattered throughout the board game are a number of spaces on which a goose is depicted; landing on a goose allows the player to move again by the same distance. Additional shortcuts, such as spaces marked with a bridge, move the player to some other specified position. The first person to reach space sixty-three wins.
3. Derrida, *La Peine de mort*, 2:187; *Death Penalty*, 2:136.
4. Ibid., 282/113.
5. Ibid., 281/110.
6. Ibid., 282–83/113.
7. Ibid., 283/113.
8. Ibid., 283/111–12.
9. Ibid., 283–84/212.
10. Ibid.

11. Ibid.
12. Ibid.
13. Ibid.
14. Ibid.
15. Ibid., 285/213.
16. Ibid.
17. Ibid., 196/144.
18. Ibid.
19. Derrida notes the necessity of the relation between the calculable and the incalculable in *Rogues*: "Each time both at once, *both* calculation *and* the incalculable *are necessary*." Jacques Derrida, *Voyous: Deux essais sur la raison* (Paris: Galilée, 2003), 208; *Rogues: Two Essays on Reason*, trans. Pascale-Anne Brault and Michael Naas (Stanford, Calif.: Stanford University Press, 2005), 150.
20. Derrida, *La Peine de mort*, 2:197; *Death Penalty*, 2:144.
21. The translator of Derrida's seminar, Elizabeth Rottenberg, whom I thank here for supplying the English pagination as well as for reminding me that she mentions "the game of the goose" in her essay "The 'Question' of the Death Penalty" (*Oxford Literary Review* 35, no. 2 [2013]: 189–204), informs me that the word *calculus* no longer appears in her translation of *The Death Penalty*. Even though the word is not used in her translation, as it was when we discussed it together with the members of the Derrida Seminars Translation Project several years ago, I believe the English term very adequately represents everything that concerns calculation in the seminar.
22. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (London: Athlone, 1970). The hedonic calculus is a calculus of pleasure meant to calculate the degree or amount of pleasure that a specific action is likely to cause or is to be gained and the pain to be avoided.
23. Derrida, *La Peine de mort*, 2:197; *Death Penalty*, 2:144.
24. Ibid.
25. Ibid., 191/139.
26. Ibid., 197/144.
27. Ibid., 198/145.
28. Martin Heidegger, *Der Satz vom Grund* (Pfullingen, Germany: Neske, 1957), 198; trans. by Reginald Lilly as *The Principle of Ground* (Bloomington: Indiana University Press, 1991), 145, trans. mod. This was a lecture course given at Freiburg in 1955–1956.
29. Derrida, *La Peine de mort*, 2:199; *Death Penalty*, 2:145.
30. Ibid., 199/146.
31. Ibid., 200/147, citing Heidegger, *Der Satz vom Grund*, 129/210. Heidegger's previous account of ground can be found in "On the Essence of

Ground," *Vom Wesen des Grundes* in *Wegmarken* (Frankfurt: Klostermann, 1967); trans. by William McNeill as *Pathmarks* (Cambridge: Cambridge University Press, 1998). There he argues that the "principle of reason" as a "supreme principle" sheds no immediate light on ground as such. Also see the lecture course *Metaphysische Anfangsgründe der Logik im Ausgang von Leibniz* (Frankfurt: Klostermann, 1978); trans. by Michael Heim as *The Metaphysical Foundations of Logic* (Bloomington: Indiana University Press, 1984).

32. Derrida, *La Peine de mort*, 2:200; *Death Penalty*, 2:147.
33. Ibid., 201/147.
34. Ibid.
35. Ibid.
36. Ibid., 202/148.
37. Ibid.
38. Ibid., 206/152.
39. Ibid., 205/151.
40. Ibid., 193/141. Adrien Schenker, "Kōper et expiation," *Biblica* 63 (1982). Reprinted in Adrien Schenker, *Text und Sinn im Alten Testament: Textgeschichtliche und bibeltheologische Studien* (Freiburg, Switzerland: Universitätsverlag and Gottingen, Germany: Vandenhoek und Ruprecht, 1991), 120–34.
41. Derrida, *La Peine de mort*, 2:193; *Death Penalty*, 2:141.
42. Ibid., 194/142.
43. Ibid., 188/137.
44. Ibid., 189/138.
45. Ibid., 203/149.
46. Ibid., 203–4/150.
47. Ibid., 204/150.
48. Ibid., 204–5/150.
49. Ibid., 205/150.
50. Ibid., 205/151.
51. Ibid.
52. Ibid., 202/148.
53. Ibid., 207/152.
54. In *The Metaphysical Foundations of Logic*, providing a context for Leibniz's principle of reason in terms of the notion of ground, Heidegger turns to the Aristotelian notion of *archē* and cites four main concepts of ground: cause, essence, argument (in the sense of a "truth"), and intention (Heidegger, *Metaphysical Foundations of Logic*, 138/111).
55. Ibid., 207/153.
56. Ibid., 208/153.
57. Ibid.
58. See my "The World after the End of the World," *Oxford Literary Review* 31, no. 2 (December 2017), forthcoming.

59. Heidegger, *Der Satz vom Grund*, 209/154. *Satz* is the proposition that is put forth, the being that is ventured, posited, wagered, but also the leap from the abyss and into the abyss. It also refers to a musical phrase or passage or movement.

60. Ibid.

61. Ibid., 208/154.

62. Ibid., 209/154.

63. Ibid.

64. Ibid. In his late poems Hölderlin refers to "measure" (*das Maas*), for example, in the penultimate stanza of "Der Rhein," where he contrasts the ability of the poet with the faculty of the philosopher, the "wise one." The poem famously declares: "Only each one has its measure [*Nur hat ein jeder sein Maas*]." Friedrich Holderlin, *Sämtliche Werke*, Große Stuttgarter Ausgabe, ed. Friedrich Beißner et al., 8 vols. (Stuttgart, Germany: Kolhammer, 1943–1985), SA 2, 1:148. Philosophy and poetry each have their own measure. Language has its own measure, meter, which constitutes the technical, "calculable" character of poetry. According to Heidegger's interpretation, "doing poetry" or "poetizing" is measuring ("*Dichten ist Messen*"). Martin Heidegger, " . . . Dichterisch Wohnet Der Mensch . . . ," in *Vorträge und Aufsätze*, ed. Friedrich-Wilhelm von Hermann (Frankfurt: Klostermann, 2000), GA 7, 190; translated by Albert Hofstadter as " . . . Poetically Man Dwells. . . ," in *Poetry*, *Language*, *Thought* (New York: Harper & Row, 1971), 221, mod. Heidegger refers to "measure-taking" as the essential act of the poet. However, in his "Measure for Measure: Hölderlin and the Place of Philosophy," Peter Fenves argues that Heidegger's reading of Hölderlin elides the problem of poetic technique "in favor of a generality about measuring as such." Peter Fenves, "Measure for Measure: Hölderlin and the Place of Philosophy," in *The Solid Letter: Readings of Friedrich Hölderlin*, ed. Aris Fioretos (Stanford, Calif.: Stanford University Press, 1999), 37. For Fenves, this neglect of the technical character of poetry, its metrical dimension, accords with Heidegger's exposition of poetry as measuring. "Having a measure," Fenves points out, "is not the same as taking one" (40).

65. Heidegger, *Der Satz vom Grund*, 209/154. On measure see Heidegger, *Vorträge und Aufsätze*, where he asks, "What is measure [*Was heist Messen*]?" 200; *Poetry*, *Language*, *Thought*, 221, mod.

66. Ibid., 209/154.

67. Ibid.

68. Ibid.

69. Ibid., 210/155.

70. Ibid., 211/155.

71. Ibid., 212/156.

72. Ibid.

73. Ibid.

74. Heidegger, *Der Satz vom Grund*, 172–73; *Principle of Ground*, 103.

75. Hölderlin, *Sämtliche Werke*, SA 5, 1:195; Friedrich Hölderlin, *Essays and Letters on Theory*, trans. and ed. Thomas Pfau (Albany: SUNY Press, 1988), 101; "Remarks on 'Oedipus,'" 101–8, "Remarks on 'Antigone,'" 109–16.

76. Jean-Luc Nancy, "Calcul du Poète," in *Des Lieux Divins suivi de Calcul du Poete*, (Mauvezin, France: Trans-Europ-Repress, 1997), 53; translated by Simon Sparks as "The Calculation of the Poet," in *The Solid Letter: Readings of Friedrich Hölderlin*, ed. Aris Fioretos (Stanford, Calif.: Stanford University Press, 1999), 44.

77. Ibid., 55/45.

78. Ibid., 59/48.

79. Ibid., 61–62/50. This sentence can alternatively be translated as: "In order to aim at [*viser*] the unity of the whole, there is no measure outside of the sighting itself."

80. Ibid., 62/50.

81. Ibid., 70/57.

82. Derrida, *La Peine de mort*, 2:216; *Death Penalty*, 2:159–60.

83. Ibid., 229/170.

84. Ibid.

85. Immanuel Kant, *Die Metaphysik der Sitten*, in *Gesammelte Schriften*, vol. 6 (Berlin: G. Reimer, 1907), 362–66; translated by Mary J. Gregor as *The Metaphysics of Morals* (Cambridge: Cambridge University Press, 1996), 497–98, qtd. in Derrida, *La Peine de mort*, 2:247; *Death Penalty*, 2:183.

86. Derrida, *La Peine de mort*, 2:248; *Death Penalty*, 2:183–84.

87. Ibid. 248/184.

88. Ibid.

89. Ibid.

90. Ibid.

91. Ibid., 249/185.

92. Ibid.

93. Ibid., 248/185.

94. Ibid., 249/185.

95. Ibid., 250/185.

96. Geoffrey Bennington, "Ex Lex," *Oxford Literary Review* 35, no. 2 (2013): 143–63, 144. Following the presentation of an early version of this essay at the American Comparative Literature Association, Geoffrey Bennington posed a question to me regarding the role of Kant and his views on calculation in the Death Penalty Seminars. I hope that my brief remarks here go in some way to make up for my inadequate response at the time.

97. Ibid., 147.

98. Derrida, *La Peine de mort*, 2:216; *Death Penalty*, 2:159–60.
99. Ibid., 206/152.
100. Ibid.
101. Ibid., 219/161.
102. Ibid.
103. Ibid.
104. Ibid.
105. Derrida, *La Peine de mort*, 2:211; *Death Penalty*, 2:32.

PART III

Extending Derrida's Analysis

CHAPTER 8

A Proper Death

Penalties, Animals, and the Law

Nicole Anderson

"Death to death."

—JACQUES DERRIDA, *The Death Penalty*, vol. 1

Introduction

When for the very first time one reads the opening session of volume 1 of *The Death Penalty*, what Derrida says may, initially, seem obvious: He is deconstructing the arguments for and against the death penalty and is quite clearly on the side of abolition—"my discourse is going to be abolitionist."[1] In a nutshell, Derrida questions the nonabolitionist position (and does so by challenging, for instance, Kant's interpretation of *lex talionis* and the principle "reason," which in turn forms the principle of the death penalty) and simultaneously poses "deconstructive questions" "about the logic that supports at present the abolitionist discourse."[2] This latter position is contestable and politically fragile, because, for instance, as Derrida summarizes it in *For What Tomorrow* (2004), abolitionism relies on the *exception* to the "right of life" and thereby places a limit on the respect for life (and in doing so inadvertently supports the "principle" if not the practice of the death penalty).[3] In deconstructing the debate he reveals the deeply metaphysical complicity of both positions. Yet Derrida's deconstruction is never so obvious or easy (after all, deconstruction is not a method that can be consistently

applied, and in *The Death Penalty* there is more than one deconstruction taking place; there is always a simultaneous deconstruction: a deconstruction even of deconstruction).[4] So what we find as we move deeper into volume 1, and culminating most overtly in the Ninth Session, is Derrida further deconstructing what underpins the metaphysical complicity of both positions—that is, a particular notion of death itself. That notion is a belief that the state of "Death" is distinctly separate from the state of "Life."

This "pre-comprehension" of what it means to die, or of what death is, betrays also an anthropocentrism when a further distinction is made between "the dying (*Sterben*) of man or of *Dasein* (only *Dasein* dies, says Heidegger) from the objective forms of animal perishing or ending."[5] A little further on Derrida confirms:

> At bottom that's the dream of deconstruction, a convulsive movement to have done with death, to deconstruct death itself. Not to put into question again the question, what is death? when and where does it take place? etc. What comes afterward? and so forth. But to deconstruct death. Final period. . . . Death to death. If death is not one, if there is nothing clearly identifiable and locatable beneath this word, if there is even more than one, if one can suffer a thousand deaths, for example through illness, love, or the illness of love, then death, death in the singular no longer exits.[6]

Note: "Death is not one." Just as in *The Animal That Therefore I Am*, where Derrida argues there is no "Animal" with a capital "A," rather there is only a "heterogeneous multiplicity of the living," a similar deconstructive move applies here: There is no "Death" with a capital "D."[7] This move, however, does not dissolve "the unity or the identity or the gravity of death, to banalize the death penalty, to relativize it. . . . It is not enough to deconstruct death itself, as it is necessary to do, in order to survive or to take out a life insurance policy. For neither does life, we are saying, come out unscathed by this deconstruction."[8] There are life penalties, too. It is not only death but life that I would argue Derrida subtly deconstructs, and I will return to this point in the next section.

The very brief reference here to the "Animal" and "Death" (in capitals) serves to demonstrate the way in which the animal is fundamental to the humanistic appeal of the death penalty. Thus, the aim of this essay is to bring Derrida's work on the animal together with his deconstruction of the death penalty in order, first, to demonstrate that the singular limit drawn between death and life by those on both sides of the death penalty debate is supported precisely by the limit drawn between animal and

human. I will attempt to demonstrate that deconstructing these limits as Derrida does cracks the foundations and exposes the contingency of the principle of the death penalty (put forward by Kant, and it will be Kant that I focus on in this essay). The second aim is to demonstrate that the singular limit between animal and human is the founding metaphysical and anthropocentric basis on which the death penalty rests. This claim will enable me to argue in turn that this limit functions to produce and perpetuate a certain type of "Life" with a capital "L." In the following section I want to elaborate this aim by comparing Kant's interpretation of lex talionis and his categorical imperative with the widespread practice of capital punishment of animals in the Middle Ages. While the contingency of Kant's position is made poignant by this comparison, it also attempts to contribute to challenging what Derrida argues is the "deeply humanistic" foundation of Kant's version of the "lex talionis" that upholds his principle and support of the death penalty.[9] What this contingency puts in question is Kant's idea that the death penalty is proper to man, precisely because challenging the distinction between human and animal reveals that what has been characterized as human may not be as "human" as we think and raises the following questions: Does the law of the death penalty, which is supposed to distinguish man from animal, merely reveal our own bestiality—a bestiality that needs taming? That is, ironically, does the death penalty inadvertently challenge the status of the human as constructed on a certain notion of the animal?

Lex Talionis and the Principle of Reason

When Derrida states that Kant's argument for the death penalty is "deeply humanistic," he is pointing out the ways in which Kant, among others in the philosophical tradition, justifies the death penalty on the basis of what it means to be human. This justification has and continues to have a powerful influence (as seen by the fact that the death penalty still exists in a Western country, the United States) and is one of the cornerstones of modern Western metaphysics. Kant's moral philosophy is arguably the most influential and famous basis for this justification. In *The Metaphysics of Morals*, Kant argues that all humans are autonomous and free, which in turn is grounded in reason and the rule of law. In other words, humans submit themselves to the rule of law that they themselves impose and institute. Moral laws, then, "are always concerned with the will and its freedom."[10] Kant's moral law or unconditional categorical imperative, and unfortunately moving too quickly here for such a complicated theory, can be summed up

like this: Because of "man's" inclinations (sensuous drives, for instance) it is necessary "that practical rules always be imperatives for humans—that is, rules to which their will must be subordinated in order to determine what ought to happen."[11] And yet, while man is subjected to the laws of reason (practical rules/laws), man does not always follow reason, and this is why Kant argues that while moral actions are "objectively necessary" they are at the same time "subjectively contingent." It is therefore vital "that man be *necessitated* to take moral free action."[12] How is this necessitation instigated? Kant goes on to argue that for necessitation to occur, paradoxically, "man" has to rely on reason. That is, moral actions should be undertaken "without any end and to whose existence no goal or end is the motive . . . rather, the necessitation to the action lies simply in the imperative alone. These are the categorically unconditional imperatives, for example, to keep your promise, to speak the truth."[13] In other words, the imperative is foundational (not reliant on any end in itself), and even though humans are inclined to go against reason, at the same time, reason is what enables humans to see the logic of "telling the truth," etc., because not doing so would not be of benefit to oneself or others. In using reason, humans therefore enact free will. Humans therefore have motives, intentions, as well as reason, which separates them from nature and from "animal will" (natural drives and instincts). Humans, in other words, have "free will" because they have reason, which gives them the autonomy to choose between right and wrong (*mens rea*): The "concept of freedom" is "the power to determine itself through reason, without needing motives from nature."[14]

Kant's moral law, his categorical imperative, in *The Metaphysics of Morals* form the basis of his interpretation and application of the law of equivalence, or lex talionis ("the law of retaliation, whereby a punishment resembles the offense committed in kind or degree").[15] Derrida describes it as such: "Regulating the talionic categorical imperative, equality (*Gleichheit*) insists first of all that whatever the harm done to the other, I inflict it equally, *a priori*, on myself."[16] If you kill someone you should kill yourself. In other words, "life" is based on a contractual exchange, and on "the principle of the preservation of life," and that contract works because the law ensures the continuation and safety of my life only if I promise that in exchange for this protection I will lose my life if ever I threaten or murder or kill another human. It is because of this contract that I, in principle, enter into by being part of the state, or the body-politic, that I am deemed, as Geoffrey Bennington puts it, to be "the agent of my own punishment, and just this confirms my status as a rational being."[17] Understanding the law we are bound to and instituted by; being self-reflective and thus able to

calculate—reasonably—the consequences of our actions, is in fact "the interpretation of reason as the 'principle of reason.'"[18] Or as Derrida puts it: "A rational and contractual exchange, a total social contract and circular economy . . . rests ingenuously on the principle of the preservation of life."[19]

But what exactly is being preserved? What kind of life, or what kind of life is "proper to man"? Is a life constructed by the social contract worth living? Can the "worth" of life be decided? The implication of the social contract is that it determines a particular kind of life: one of calculated decision and rationality. As Derrida argues elsewhere, decision is a political formula, a method, a law for action (and that leads to prescriptive ethics or responsibility).[20] However, for Derrida, the notion of decision is possible precisely because every decision is based, and depends, on a moment of undecidability, a moment that is not a formulated law or rule. And the fact that jails in the United States are full of people on death row is testament to the undecidability of the decision, to the failure of the social contract, and to the belief in the principle of reason that ensures the principle of the preservation of life. Therefore, the social contract and the metaphysical construction of the notion of death mean that life, like the modern death penalty, is mechanized. This mechanization can be elucidated through Michael Naas's discussion of Derrida's *The Animal That Therefore I Am* when he argues that what Derrida puts in question is "the philosophical *principle* behind the claim that humans themselves can respond, that they possess a form of language that can really be distinguished from a mere code. . . . In the most seemingly spontaneous human response there is always an irreducible element of automatism, of machinelike or not fully conscious or intentional reaction, of expropriation into a language that is coded."[21] The next section will elaborate on the notion of response (the domain of humans only) as opposed to reaction (what only animals can do).

To return to Kant, what the social contract and thus the decision means for Kant is that in the individual "the principle of autonomy is thus the self-possessed legislation of the power of choice through reason."[22] In turn, the principle of autonomy leads to the obedience of the moral law, in and through which humanity attains freedom and Enlightenment. Any legislation that rests on grounds other than the "freedom of reason" is, Kant insists, "heteronomy," to which Kant is opposed.[23] Reason and autonomy therefore are two of the hallmarks of being human, and hence Derrida's comment that Kant's talionic interpretation is humanistic in the Enlightenment sense. For Kant then, the death penalty to which I have always already consented (simply by being part of the body-politic) in fact

"confirms my rationality" and, as Derrida argues, "marks access to what is proper to man and to the dignity of reason or of human *logos* and *nomos*."[24] To put it another way, being distinct from murder, the death penalty is a "legal and legitimate sentencing" precisely because of the social contract into which "man" has entered. Thus for Derrida, Kant sees in the death penalty "the ultimate justification of the *jus*, of justice and of law. There would be no human *jus*, no law, and no justice in a system that excluded the death penalty."[25] Based on the biblical commandment "Thou shalt not kill," the irony of this legal sentencing is conveyed sardonically by Derrida when he comments: "The two deaths, the two puttings to death apparently have no relation, or so little relation, they are so heterogeneous that there would be no contradiction in proscribing the one while prescribing the other, in saying 'thou shalt not kill' in the sense of 'thou shalt not murder' and then saying, ordering that whoever murders shall be punished by death."[26]

Kant's categorical imperative follows this biblical logic: "The categorical imperative of penal justice demands that any act of putting to death contrary to the law, the killing of another when it is contrary to the law . . . must be punished by death."[27] In deconstructing Kant's position, Derrida unties a contradictory knot that he calls the "double bind" of "the extraordinary rationality but also the stupid uselessness of this Kantian logic."[28] What we have seen so far in the logics of Kant's argument is that there is no law or justice without the death penalty; that this law is and should be one of equivalence (lex talionis: an eye for an eye) even though God's commandment is "Thou shalt not kill"; and that this equivalence goes hand in hand with the principle of reason, and thus the death penalty is what is proper to man.[29] But it does not end here. As Derrida points out when referring to Plato's *Laws*, the rationality of law, and the "reason" of humans, means that "even if the one condemned to death is deprived of life or of the right to life, he or she has the right to rights and, thus, in a certain way to honor and to a burial place."[30]

We can understand this notion of "right to rights" by turning momentarily to Hegel, who on this issue argues that the human is defined by its relation to itself. For Andrew Benjamin, according to Hegel, that relation has to be "willed" and therefore is an "active" (not a "passive") relation. As Derrida elsewhere demonstrates, Hegel's notion of the relation of will entails the immediate presence to self.[31] It is the subject's presence to self in thought, which is manifested through Reason and rationality that distinguishes the human from the animal. While the animal has a relation to itself, in the sense that it possesses its own body, this relation is not active,

and therefore, for Hegel, the animal does not have "will." Benjamin summarizes Hegel's position in this way: "The absence of a willed relation between 'I' and its life or body in the animal means that it does not have 'a right' (*Recht*) to that life. . . . The potential for the animal to be killed [by humans] is due to the absence within the conception of possession proper to the animal of a willed relation between body and soul."[32] In other words, the animal is "passive" because it does not have a relation to itself; a relation that is a result of "will" and rationality. Therefore, animals do not have "rights" because in order to have rights one has to be rational, and in the history of the philosophy of the West, animals are not rational and do not "act" according to Reason. Consequently, not only do humans have the "right" to kill animals, but humans have to confer rights to animals, and in the conferring humans reaffirm the hierarchical opposition between humans and animals. We will come back to this conferral shortly.

Now what is shocking, Derrida goes on to argue, is that this "right to rights," and thus to the right of burial (which is dignified and honorable), contributes to what "marks the difference between man and beast, between the man condemned to death who still has a right to burial, to men's honor, and the one who no longer deserves even the name of man and who therefore does not deserve even the death penalty."[33] The animal therefore does not have the right to burial because the animal does not supposedly have a relation to death. The animal does not have a relation to death because, as we saw earlier in Kant and Hegel, the animal does not have reason or intention (mens rea). Without this quality, as Heidegger insists, animals are unable to understand their own deaths. They merely perish; they do not die.[34] To put it another way, because the animal does not have reason on which to decide its own fate or to follow or "respond" to a categorical imperative, the animal does not have the right to burial. In this way "man" is distinguished from animals precisely because "man, unlike beasts, is a subject of the law who raises himself above natural life."[35] As Derrida argues in *The Animal That Therefore I Am*, while "Kant's 'I think' calls into question the whole repertoire of Cartesian ontology relating to the *cogito ergo sum* (nevertheless, it concerns an 'I think' that, accompanying every representation, and this is what counts, defines the relation to self of reason, which is denied the animal)."[36]

Kant, Hegel, and a whole tradition of philosophers (including Lacan, Heidegger, and Levinas) institute a sharp divide and thus opposition between "Animal" and "Man," which functions not only to subordinate animals to "Man's" control but also to justify "the dignity of man, his sovereignty, the sign that accedes to universal right and rises above animality

. . . above biological life, puts his life in play in the law, risks his life and thus affirms his sovereignty as subject or consciousness. A code of law that would refrain from inscribing the death penalty within it would not be a code of law; it would not be a human law, it would not be a law worthy of human dignity."[37] This is one way of overcoming the fear of death, to be sure. It is a way of understanding Death as "not natural" and, hence, the sharp distinction between Life and Death, both of which are defined on humanistic grounds.[38] But as Derrida argues in *The Animal That Therefore I Am*, this homogenizing of "Animal" and "Human" fails to acknowledge that "beyond the edge of the so-called human, beyond it but by no means on a single opposing side, rather than 'the Animal,' or 'Animal Life' there is already a heterogeneous multiplicity of the living, or more precisely. . . , a multiplicity of organisation or lack of organisation among realms that are more and more difficult to dissociate by means of the figures of the organic and inorganic, or life and/or death."[39]

In the same way that Derrida, as we saw earlier, does not want to dissolve "the unit or the identity or the gravity of death," Derrida's aim here is not to blur the line so that differences cease to exist and there is a total homogenization between animal and human, life and death.[40] Rather, Derrida reveals that there are many lines and lives, there is a "whole differentiated field of experience and a world of life forms" that need accounting for in order to think of "death," "life," and the "living" otherwise. Testifying to this multiplicity of difference and to some extent demonstrating not only the differences between animals, between humans, between human and animals, but also the continuum of lives and experiences so as to expose the human as animal, I want to turn to a discussion of the medieval capital punishment of animals. The capital punishment of animals challenges not only the universalism of Kant's categorical imperative but the singular limit drawn between death and life.

Lex Talionis for Animals

In *The Criminal Prosecution and Capital Punishment of Animals*, first published in 1906, E. P. Evans takes the reader through numerous cases of animals being prosecuted by trial and jury in the Middle Ages throughout Europe. Animals—such as pigs, cows, dogs, rats, horses, donkeys, oxen, birds, and so on—were prosecuted for various crimes; insects were even punished for causing the failure of a farmer's crops. Criminals, both animal and human, often shared the same jail, and in cases of bestiality both the human and animal were sentenced to death at the same time, the animal being seen as

complicit in the act. In one such case the man who committed an act of sodomy "was expressly enjoined that in burning the bodies the man's should lie underneath that of a beast."[41] I quote the following two descriptions out of hundreds of these cases as they will be significant in elucidating Derrida's discussion of Kant shortly:

> In 1386, the tribunal of Falaise sentenced a sow to be mangled and maimed in the head and forelegs, and then to be hanged, for having torn the face and arms of a child and thus caused its death. Here we have a strict application of the lex talionis, the primitive retributive principle of taking an eye for an eye and a tooth for a tooth. As if to make the travesty of justice complete, the sow was dressed in man's clothes and executed on the public square near the city-hall at an expense to the state of ten sous and ten deniers.[42]

and

> A dog is tried for stealing and eating a capon. . . . The accused [the dog] is condemned to the galleys. Thereupon the councel for the defendant brings in a litter of puppies . . . and appeals to the compassion and implores the clemency of the judge. [The judge's] feelings are touched, for he, too, is a father; as a public officer, also, he is moved by the economical consideration of the expense to the state of keeping the offspring of the culprit in a foundling hospital, in case they should be deprived of paternal support.[43]

This latter case was written about by Racine whose aim was to ridicule the abuse of lex talionis when it came to animals. Indeed, this practice of lex talionis for animals may seem odd, but Evans suggests that it is a direct result of the Old Testament where in the "covenant of Noah it was declared that human blood should be required not only 'at the hand of man,' but also 'at the hand of every beast;' and it was subsequently enacted, in accordance with this fundamental principle, that 'if an ox gore a man or a woman that they die, then the ox shall be surely stoned, and his flesh shall not be eaten.'"[44] Evans uncritically homogenizes and declares that the reason for the killing of an animal in the Middle Ages was to prevent an animal from injuring or killing more people but also to punish the owner of the beast. However, this explanation of lex talionis for animals does not quite account for why an animal is put on trial with a full jury to the cost of the state. In fact, I would argue that the lex talionis for animals in the Middle Ages demonstrates a relationship with and to animals that has been, and continues to be, overly simplified by philosophers and metaphysicians. This

simplification might be said to culminate during the Enlightenment with the drawing of a sharp distinction between Animal and Human and by the quality of ipseity attributed to the human and denied the animal.[45] While lex talionis for animals might have contributed to constructing the distinction between animal and human, the use of lex talionis also suggests a more complicated belief at this time that animals could act morally and, therefore, have personhood.

On the one hand, this practice of the capital punishment of animals in some respects heightens the distinction between human and animal. If animals, like humans, are judged and sentenced to death in a court of law, then humans who break the law are no better than animals. The capital punishment of animals may indeed have been a means of controlling human behavior. Thus, dressing a sow in man's clothing and creating a public spectacle through hanging the pig in the public square perhaps sends the message that there is a certain kind of human (a criminal, murderer, or sodomist) that carries no dignity. The public spectacle of the animal (in this case the pig) takes place in the age of the visibility of punishment (as defined by Foucault in *Discipline and Punish*) and from which Derrida quotes in *The Death Penalty* volume 1. Quoting and referring to Foucault, Derrida says that before the beginning of the nineteenth century when "'the age of punitive sobriety begins'" what was essential to punishment was the "right to punish as right to see-punish(ed)."[46] So mocking a pig by dressing it in man's clothing acts as a public warning to humans that if they find themselves in the same position they will be made a spectacle of in death and thus denied a dignified death. This dignity of a proper burial is reminiscent of Plato's *Laws* discussed earlier, but as we will see, implicit in Heidegger's idea that the animal does not die, it simply perishes, is the notion that animals do not need dignified burial.

On the other hand, putting the animal on trial at the same time elevates it beyond its perceived animality and gives it dignity, whether intended or not. The process, in fact, gives to animals some form of personhood. In other words, what these cases of lex talionis for animals show is that the line is significantly blurred between the animal (which has personhood because it is worthy of being tried in a court of law) and human (which loses his/her personhood if tried with an animal). Moreover, being tried in a court of law suggests that there was belief that the animal's action had intention, which further implies some consciousness or knowledge of what is right or wrong (mens rea). If an animal has intention, then what is also implicitly attributed to the animal is an ability to "respond," which thereby puts into question the sharp line separating human from animal based on

the notion that animals react but only humans respond. But for a range of philosophers in the history of metaphysics (such as Kant, Hegel, Lacan, and Heidegger), on the side of "reaction" is associated natural and instinctual desires and actions and on the side of "response" is reason, language, and self-reflection. And accordingly, animals cannot respond, because they cannot respond to the call of the principle of Reason. As Derrida elucidates in "The Principle of Reason: The University in the Eyes of Its Pupils," traditionally, "the response to the call of the principle of reason is thus a response to the Aristotelian requirements, those of metaphysics, of primary philosophy, of the search for 'roots,' 'principles,' and 'causes'"; it is a response (not reaction), in other words, that utilizes a dimension of technical, scientific, and philosophical reason or thought and criticism.[47]

Now despite the paradoxes and contradictions that could be raised about attributing to animals in the medieval courts an ability to respond precisely because they have intention (mens rea), and despite questioning, as Derrida does throughout his oeuvre, the borders constructed by various metaphysical positions (between life/death, human/animal, reaction/response, faith/reason, and so on), Derrida states in *The Animal That Therefore I Am*, "We are not concerned with erasing every difference between what we are calling reaction and what we commonly name response. . . . My hesitation concerns only the purity, the rigor, and the indivisibility of the frontier that separates—already with respect to 'us humans'—reaction from response and in consequence, especially, the purity, rigor, and indivisibility of the concept of responsibility that is derived from it."[48]

This concern could be applied to all the borders Derrida deconstructs, but as regards to "response," as we have seen, to respond (and thus to not respond) also means to take responsibility for one's actions or lack of action, but it is a response that is founded on a metaphysical ethical system that constitutes not only the humanist subject as ipseity but also a particular Enlightenment notion of reason and knowledge. Thus, in questioning the purity of the line between reaction and response Derrida is also questioning, as Michael Naas interprets it, "the claim that humans themselves really can respond" and "whether there is anything like response as such, a response that would remain pure and uncontaminated by reaction."[49] It is because humans "respond" that the death penalty is considered, in the history of philosophy, proper *only* to humans. To suggest otherwise, as Naas argues, would be to put "into question that philosopher's entire ontological, epistemological, or ethical program" and that is why I argue the comparison between the lex talionis of animals in the Middle Ages and the lex

talionis of humans in modern times is so informative, as it undermines the universalism of the principle of the death penalty and Kant's categorical imperative.[50] In other words, as mentioned earlier, Kant's categorical imperative is the belief that humans have "free will" because they have reason, and reason in turn gives them the autonomy to choose between right and wrong (mens rea), which makes them moral subjects. It is because humans are moral subjects that Kant can define the principle of the death penalty as that which is proper to the human and not to animals. Again, this is because only humans understand the law that we ourselves institute and are bound by, because only we can reasonably calculate the consequences of our actions. What is "proper to man," then, is based on the sharp distinction between human and animal. And yet, what the capital punishment of animals throughout the Middle Ages suggests is that what is currently "proper to man" was also once proper to the animal, thereby undermining the supposed universalism of the modern death penalty principle by revealing its contingency and construction.

Conclusion

In summary, then, the separation between the modern principle of the death penalty (as represented by Kant) and the lex talionis of animals in the Middle Ages hinges on a particular understanding of reason: a notion of death as proper only to the human and a notion of what constitutes a cruel death. Cruelty is one of the dominating tropes that runs throughout *The Death Penalty* volume 1, and while this chapter does not have the time and space to elaborate on this in detail (along with Derrida's exposition on Nietzsche's critique of Kant's categorical imperative as cruelty), suffice it to say that one of the differences is that the public spectacle or "theater" of cruelty of the death penalty is abandoned in modern times.[51] And yet, as Derrida elaborately unravels, while it may seem that the modern death penalty abandons cruelty through the modern apparatus or machine (such as the guillotine and currently in the United States through lethal injection), it is simply that cruelty is rendered invisible.[52] In deconstructing the border between noncruelty and cruelty, Derrida demonstrates that there is rather more or less cruelty regardless of its attempted invisibilization in the contemporary moment.[53] However, the border between cruelty and noncruelty also relies on the human-animal distinction: On the one hand, because death is what is proper to the human, humans understand what it means to be punished and what it means to die, and it is this reasoning that elevates the human above the animal and thus induces us to minimize the

cruelty of death. The rationale behind the modern death penalty is that the penalty is less cruel because it reduces suffering. It is not death itself but our knowledge of death, and that we can be penalized by death, that, generally speaking, is the punishment.[54] On the other hand, according to numerous philosophers including Kant, animals do not die, they do not understand death, and therefore they do not understand life—they are automatons according to Descartes.[55] It is precisely this belief that justifies humans killing and sacrificing and thus dominating animals in order to establish our superiority.[56]

Paradoxically this also means that we become separated further from animals through this domination and we become separated from, and deny, our own animality through this hidden and mechanized execution. The actual mechanization of death becomes dignified. It is worth quoting Derrida in full here as he articulates how the mechanization of death, and thus the metaphysics of death itself, is what defines the essence of, and what is proper to, the human:

> The guillotine signalled or in any case was felt to be and was interpreted and justified as humane progress, progress in the sense of the human, a becoming-human of putting to death. . . .
>
> Before going further and insisting on this humanization, this humanism, this humanitarianism of the guillotine [and Derrida says this of lethal injection as well], I would be tempted to ask the following question: what is it that is proper to man; what is the history of what is proper to man that allows one to think this? What must be that which is called man so that at a moment of his history he comes to consider the guillotine as an advance in human progress, an advance in man's appropriation of his essence? . . .
>
> What must man be, what must man, the humanity of man have been, to have inscribed, incorporated as it were, the guillotine in the corpus of the rights of man? To have invented such a machine while interpreting it as a sign of man's love for man.[57]

If death, and if *how* we put to death, is what makes us human, then in a strange logic death is circumvented because death becomes understood as that which is special and unique to the human. In other words, if what is "proper to man" means understanding how we put to death because we heed the call to the principle of Reason, then our relation to death (following the logic of Kant here) is what raises us above animality and makes us unique in our humanness. However, as we have seen with the lex talionis of animals, the uniqueness of humanness is undermined once the constructed

and contingent distinction between animal and human is compromised. Once that boundary is breached, we are forced to perhaps look the meaninglessness of death in the face (because it is possibly *not* what is only "proper to man") and grasp the horror of death as well as the horror of life. The implications of deconstructing the death penalty as that which is "proper to man" is that the burden of responsibility for "life," for "decision," requires that we as humans do not shirk our responsibility to life. That is, it requires that we do not use or hide behind the death penalty to avoid understanding and taking responsibility for the multiplicity of other lives and deaths (including animals) that define and help us live.

NOTES

1. Jacques Derrida, *The Death Penalty*, vol. 1, trans. Peggy Kamuf (Chicago: University of Chicago Press, 2014), 5n7.

2. Ibid.

3. Jacques Derrida, *For What Tomorrow. . .: A Dialogue*, interview with Elisabeth Roudinesco, trans. Jeff Fort (Stanford, Calif.: Stanford University Press, 2004), 148–53.

4. In the Ninth Session of *The Death Penalty* volume 1, Derrida talks of his many angels (327–28). These figures are not part of religious experiences in the dogmatic sense. Rather, his angels are metaphors for deconstruction (for the deconstruction of deconstruction). In other words, deconstruction is not a homogenous method that is consistently applied to various texts and concepts. There are only "deconstructions in the plural," which ensure that there is not simply an overturning of one reading or classical opposition but that even the process of this overturning is in itself turned on so as not to replace one oppositional structure and metaphysical system with another. Through the deconstruction of deconstruction, what is continually exposed is the other within ourselves, within a text. See Kelly Oliver, *Technologies of Life and Death: From Cloning to Capital Punishment* (New York: Fordham University Press, 2013), 12.

5. Derrida, *Death Penalty*, 1:238.

6. Ibid., 240–41.

7. Jacques Derrida, *The Animal That Therefore I Am*, trans. David Wills (New York: Fordham University Press, 2008), 30, 31.

8. Derrida, *Death Penalty*, 1:253–54.

9. Ibid., 147.

10. Immanuel Kant, "The Metaphysics of Morals," in *Moral Philosophy from Montaigne to Kant*, ed. J. B. Schneewind (Cambridge: Cambridge University Press, 2003), 653.

11. Ibid., 654.
12. Ibid.
13. Ibid., 654.
14. Ibid., 656.
15. A. Stevenson and M. Waite (eds.), *Concise Oxford English Dictionary*, 12th ed. (Oxford: Oxford University Press, 2011), 820.
16. Derrida, *For What Tomorrow*, 151.
17. Geoffrey Bennington, "Ex Lex," *Oxford Literary Review* 35, no. 2 (2013): 150.
18. Derrida, *For What Tomorrow*, 151.
19. Derrida, *Death Penalty*, 1:15.
20. Jacques Derrida, *Adieu: To Emmanuel Levinas*, trans. Pascale-Anne Brault and Michael Naas, eds. W. Hamacher and D. E. Wellbery (Stanford, Calif.: Stanford University Press, 1999), 116.
21. Michael Naas, *The End of the World and Other Teachable Moments: Jacques Derrida's Final Seminar* (New York: Fordham University Press, 2015), 27–28.
22. Kant, "Metaphysics of Morals," 659.
23. Ibid., 660.
24. Bennington, "Ex Lex," 150; Derrida, *Death Penalty*, 1:9.
25. Derrida, *Death Penalty*, 1:9.
26. Ibid., 12, 14.
27. Ibid., 126.
28. Ibid., 126–27.
29. Ibid., 9.
30. Ibid., 8.
31. Andrew Benjamin, "Indefinite Play and the 'Name of Man,'" *Derrida Today* 1, no. 1 (2008): 6.
32. Ibid., 18.
33. Derrida, *Death Penalty*, 1:9.
34. Ibid., 99.
35. Ibid., 8.
36. Derrida, *The Animal That Therefore I Am*, 90.
37. Derrida, *Death Penalty*, 1:116.
38. Ibid., 117.
39. Derrida, *The Animal That Therefore I Am*, 31.
40. Derrida, *Death Penalty*, 1:253–54.
41. E. P. Evans, *The Criminal Prosecution and Capital Punishment of Animals* (Clark, N.J.: Lawbook Exchange, 2009), 150.
42. Ibid., 140.
43. Ibid., 166–67.

44. Ibid., 168–69.

45. *Ipseity* is a word that encapsulates a variety of human/ist traits, such as autonomy, self-presence, self-reflection, reason and rationality, and automobility.

46. Michel Foucault, qtd. in Derrida, *Death Penalty*, 1:43.

47. Jacques Derrida, "The Principle of Reason: The University in the Eyes of Its Pupils," *Diacritics* (1983): 8.

48. Derrida, *The Animal That Therefore I Am*, 125.

49. Naas, *End of the World*, 27–28.

50. Ibid., 30.

51. Derrida, *Death Penalty*, 1:148.

52. Ibid., 205.

53. Ibid., 201–5.

54. For some ("criminals or condemned ones") this knowledge of the precise second in which they are going to be put to death is a means of control, of omnipotence, a "phantasmatic mastery" that allows some to tell themselves the story "of how death will not take me by surprise and thus will remain at my disposal, like a quasi-suicidal auto-affection." Derrida, *Death Penalty*, 1:219.

55. Derrida, *The Animal That Therefore I Am*, 151, 89.

56. Ibid., 136.

57. Ibid., 192–93.

CHAPTER 9

Figures of Interest

The Widow, the Telephone, and the Time of Death

Elissa Marder

The Scene of Death

Throughout the Death Penalty Seminars, Derrida insists upon the irreducibly theatrical and spectacular nature of any legal execution.[1] Whether or not a legal execution is carried out in the public forum or in an isolated prison cell, whenever a sovereign state exerts its legal right to demand the life of a citizen, the execution makes a public scene. To the extent that any state-sanctioned execution carries out and enforces the law, each and every execution represents the law. An execution, in other words, is not merely the material outcome of a legal process but also the very representational means by which the law stages and asserts its own legitimacy. The fact that the death penalty simultaneously acts upon a particular person in a particular case and re-enacts the general terms of the law is what gives it its essentially "theatrical" dimension. Derrida writes: "By definition, in essence, by vocation, there will never have been any invisibility for a legal putting to death, for an application of the death penalty; there has never been, on principle, a secret or invisible execution for this verdict. The spectacle and the spectator are required. The state, the polis, the whole of politics, the

co-citizenry—itself or mediated through representation—must attend and attest, it must testify publicly that death was dealt or inflicted, it must *see die* the condemned one. The state must and wants to *see die* the condemned one."[2]

As the most extreme (and perhaps uniquely irrevocable) expression of the law, every case in which the death penalty is carried out re-enacts and performs a drama in which the very legitimacy of the law—and its application—is at stake. As Derrida explains, capital punishment is a public spectacle in which everyone is implicated: "The state, the polis, the whole of politics, the co-citizenry—itself or mediated through representation—must attend and attest, it must testify publicly that death was dealt or inflicted, it must *see die* the condemned one."[3] This is why, regardless of the specific modalities of the death in question (hanging, firing squad, guillotine, gas chamber, electric chair, or lethal injection) or the specific geographic location (open public square or hidden prison chamber) all state executions are "visible." They belong to the public sphere. Executions must take place—even if only "symbolically"—*under* the gaze of the public, *for* the gaze of the public, and *in* a public space.

But what is the precise nature of that "symbolic" public space? And how does the overdetermined and excessive theatricality of capital punishment engage in what Derrida calls "the *mise en scène*, the essential voyeurism that attaches to a putting to death that must be public because legal"?[4] To begin to appreciate the ramifications of this question, it is important to underscore that if capital punishment is always visible, regardless of whether or not that visibility is ever actualized as something literally seen or even seeable, it is because it can only constitute itself as an expression of the law by making a scene.[5] The scene of capital punishment requires that the executions that have been staged and carried out in a particular time and place also be played out elsewhere, on another scene, in a fictional or virtual space. As with theater, dreams, and the unconscious, capital punishment creates a spectral space that removes its action from being confined to its occurrence in any real time or place. Unlike those other forms of theater, however, the public nature of the scene of execution produces a form of theatricality that is irreducibly spectral and uncanny: It aims to preserve the very act of putting to death as an event that can be witnessed at will, replayed indefinitely, and relived, as it were, by the law. In the closing lines of the opening session of the seminar, Derrida declares that understanding the strange modality of this theatrical public nonspace—so that one can ultimately find a way out of it—is nothing less than the first condition for thinking about the death penalty: "We are here—permit me to recall this

because it is essential and decisive at this point—neither in a courtroom or on a witness stand, nor in a place of worship, nor in a parliament, nor in print, radio, or televised news. And neither are we in a real theater. To exclude all of these places, to exit from all of these places, without exception, is the first condition for thinking the death penalty. And thus for hoping to change it in some way."[6]

If Derrida argues that all public executions participate in a "theater of cruelty" regardless of the actual degree of blood or cruelty involved in the particular manner by which the death is administered, it is because the "cruelty" lies in the complex nature of the scene itself. Scenes of execution are not merely staged in the service of public interest; they are representational bearers of the (often hidden or unacknowledged) interests that determine the very constitution of a given public sphere. To say that the death penalty makes a scene is also to say that it is constitutively overdetermined by multiple interests, investments, and incalculable elements that undermine, haunt, and exceed the legal calculus that ostensibly justified the verdict. No matter how heinous the crime or warranted the punishment might appear to be, these multiple, and ultimately indeterminable, interests introduce cruelty—and with it phantasmatic and fictional investments of all sorts—into every real instance in which the death penalty is applied.

As Derrida insists, the scene in question is therefore not merely inherently cruel, it is also obscene in every sense of the word. Although the execution takes place in full view of the public, for the public, its theatrical dimension creates a space in which all of the ostensibly rational legal calculations that led up to the verdict accrue political, psychic, sexual, philosophical, legal "interests." Derrida first expresses his "interest" in the ways that the death penalty is inseparable from the question of "interest" through a reading of a bitter, ironic, and caustic short fragment by Charles Baudelaire. In that text, Baudelaire expresses disdain and contempt for what he sees as the hypocritical, deluded, and ultimately self-interested motives that underwrite the ostensibly high-minded political, moral, and theological ideals espoused by abolitionism. According to Baudelaire, the abolitionists' passionate display of concern for the life is nothing other than a mask under which lurks feminine weakness, fear, and guilt. Although Derrida makes it clear that he does not agree with Baudelaire's violent and reactionary endorsement of the death penalty, he does credit Baudelaire for having identified the motif of "interest" that, he will go on to claim, haunts all considerations of the death penalty. Derrida writes:

> The reading we are going to attempt and the questions we are going to pose might, up to a certain point, be inscribed under the expanded sign of what Baudelaire calls, as you remember, interest. What is an interest? The word itself is interesting, where it implies in Latin both the fact of finding oneself or of being in the middle, between, implicated in a space larger than oneself and, on the other hand, fiduciary calculation, surplus value, the search for a profit and a capitalization, in short, an economy—either monetary or psychological, the search for a greater well-being, for a greater good, one's own good or one's own well-being, an increase of enjoyment. What is an interest? What does it mean "to be interested," "to be interested in"?[7]

Throughout the seminar, Derrida dwells on the term *interest* to show that there is no philosophical, literary, religious, or even legal position in relation to the death penalty that is immune from the question of interest. Although, as we have just seen, he initially borrows the word from Baudelaire, who utilizes it in his mean-spirited and reactionary critique of Victor Hugo's passionate efforts to abolish the death penalty, Derrida goes on to show, via Nietzsche, how every philosophical claim that purports to be disinterested (and here Nietzsche is aiming at Kant in particular) inevitably involves either a hypocritical denial—or unconscious repression—of hidden or distorted interests. In the closing lines of Session Six, Derrida writes: "As for the motif of interest, one should not necessarily confine it, as Baudelaire does, as Nietzsche also does no doubt, although less narrowly, to the sphere of zoo-psychobiology, in the common sense of this term, to the conscious or unconscious motivations of an individual, whether he be an abolitionist or an anti-abolitionist. No doubt we must broaden this analytic of interest to the social or national or state body and ask ourselves what interest a state, a national state, or even a global state might have in maintaining or suspending capital punishment."[8]

La Veuve

The question of interest brings us to the set of very interesting questions that motivated this paper: How are we to understand why so many—if not most—of the machines associated with the death penalty are eroticized and feminized? Curiously, despite the fact that Derrida refers to this feminization of the death machines explicitly at several crucial moments in the seminar, despite his frequent allusions to the importance of structures of sexual difference and familial configurations in many of the texts he dis-

cusses, and despite the fact that he recounts several salient anecdotes and textual details that link the death penalty to depictions of anxieties concerning specifically feminine figures, in *The Death Penalty* volume 1, Derrida does not, in fact, put forth either a sustained argument or a systematic analysis to explain why so many lurid and graphic figures of feminine sexuality occupy such a prominent place in the history of the death penalty.

That said, I do think that Derrida does provide the groundwork for such an analysis. I would like to indicate (if only schematically) where such an analysis might begin. The conceptual challenge here, though, is not only to provide a convincing reading of these lurid feminine figures but also to provide an account for how and why they are necessarily inscribed within—and perhaps complicate—the terms of his elaboration of the death penalty. Virtually every time Derrida brings up the question of the quasi-omnipresent sexualization and/or feminization at work within the death penalty scenario, he tends to dismiss it shortly thereafter. Thus, for example, when he prepares to do a close reading Dr. Guillotin's description of his own machine in Session Nine, Derrida remarks:

> Before reading a few lines of this article, I would like at least to formulate the following question: how does it happen that an urge or a compulsion drives one to turn these tragic death machines (the guillotine and others, Old Sparky, for example) into targets of laughter, ridiculous figures, quasi persons appealing to *Witz*, to the *mot d'esprit*, to some joke, or witticism in bad taste? And first of all, what is this compulsion to name them derisively, to give them a proper name, a name at once proper and common (Old Sparky, la Guillotine, The Widow, The Maiden, Mannaia, etc.?), the proper and common name of a figure that is more often than not feminine? Why, as we said, would this death machine resemble, for man, for the human and more often than not the masculine phantasm, a woman (virgin, mother, whore, or widow) who makes us laugh where she scares us, in whose face we sometimes laugh with nervous and anxious laughter, you remember, upon seeing in this woman a devourer, a swiller, with or without teeth?
>
> I will not insist, you see very well, I suppose, in which direction these questions can orient their elaboration if not their answers. All I am suggesting is that this direction is perhaps not so foreign to the one that leads to the drives and compulsions that gave birth in the first place to these machines themselves [*qui ont d'abord donné naissance à ces machines mêmes*], to their figuration, to the figuration of their figure, to their invention, and to their being put into operation.[9]

Derrida insists, rather emphatically, that he does not need to elaborate any interpretation of the feminine figuration of the death machine because we already know where these questions would take us. He is alluding, of course, to psychoanalysis. Given his reference to the *Witz*, the joke, and the drives, Derrida gestures to psychoanalysis and acknowledges, without quite saying so, that he knows very well that psychoanalysis would and could provide an entire conceptual edifice for thinking about how the terror inspired by the death penalty becomes transposed into a fear of castration. Psychoanalysis would be able to interpret why the death machine becomes incarnated by a phallic feminine figure, who is a bloodsucking vampire, *vagina dentata*, with or without teeth; it would also provide an economic model of the psyche to explain how the terrifying fear of death becomes figured and reconfigured as something that provokes laugher. He implicitly concedes that psychoanalysis would surely have a way of explaining that the "nickname" or the "joke" attached to the death machine (the "widow" or the "maiden") provides the male subject with a defense mechanism that enables him to ward off his anxiety about impending death by means of anthropomorphism, feminization, and humor. All of this, however, Derrida says without saying. It seems likely that his reticence regarding this line of questioning stems from a double gesture: Whereas he might be prepared to acknowledge that a psychoanalytic reading might, in fact, be relevant—if not downright unavoidable—he nevertheless remains reluctant to accord psychoanalysis the authority, or the right, to adjudicate in this matter. Thus, although he implicitly appeals to psychoanalytic concepts (the structure of the Witz, etc.), he clearly wants to maintain a critical difference between a psychoanalytic reading of this figure and his own conception of the interests (both conscious and unconscious) that are mobilized by the death penalty.

At the very end of this contorted passage, however, in what might appear to be a throwaway line, Derrida makes a peculiarly interesting—we might even say fertile—suggestion about what he *does* want to say: "All I am suggesting is that this direction is perhaps not so foreign to the one that leads to the drives and compulsions that gave birth in the first place to these machines themselves [*qui ont d'abord donné naissance à ces machines mêmes*], to their figuration, to the figuration of their figure, to their invention, and to their being put into operation."[10]

By establishing an affinity between psychoanalytic accounts of sexuality and the "drives and compulsions that gave birth to these machines themselves," Derrida seems to be implying that if there is some relation between the theater of cruelty in the death penalty and the organization of the

psyche around the question of sexual difference, that relation would be found in the fact that in both cases there is an analogous "drive" to figuration and enactment. Like dreams and symptoms, the scene of the death penalty is a stage that must be populated by figures. The death machines that are "invented" for this scene are neither literal nor arbitrary: Rather, they are figures that organize the material conditions and philosophical principles of the law of which they are also both an expression and manifestation. The most striking thing about this passage, however, is that Derrida uses the figure of childbirth (*ont donné naissance*) to describe the forces, the "drives and compulsions" that gave rise to the invention of the death machine. As it happens, references to childbirth, pregnancy, pregnant women, and mothers proliferate (albeit somewhat latently) in *The Death Penalty* volume 1. More often than not, we find that the scene of death is populated by figures (both reported by Derrida in the texts that he reads and in his rhetorical gestures) in which birth and death converge in uncanny and surprisingly interesting ways.

All of which brings us, finally, to the figure of the guillotine, "*La Veuve*," herself. Drawing on Daniel Arasse's impressive book, *The Guillotine and the Terror*,[11] Derrida reminds us in Session Eight that: "The guillotine signaled or in any case was felt to be and was interpreted and justified as humane progress, progress in the sense of the human, a becoming-human of putting to death. . . . This humanitarian machine, is also not only in synchrony but in metaphysical system, if I may say that, with the Revolution and the Rights of Man."[12] Designed both to humanize death and embody the law, the guillotine was intended to give the law a human face and body. Not only calibrated to be a perfect fit with the human body, the machine was also given a human name and, most bizarrely, a quasi-human biography and life story. In this context, Derrida retells an astonishing anecdote concerning the "birth" of the machine's father: Joseph-Ignace Guillotin. Apparently, while pregnant with the future doctor, his mother was "so traumatized by the screams of a man who was being tortured on the wheel" that she went into premature labor and, so the legend goes, Guillotin had "the executioner for a midwife."[13] Thus, the man whose human birth was precipitated prematurely by the cruelty of an inhuman "human" executioner was predestined, as it were, to invent a more-human-than-human machine of death to compensate for and repair the damages and sufferings that were the occasion of his untimely birth. Guillotin, the man who had the executioner as a midwife, responded to this fate by "giving birth" to the guillotine: the mother of all human death machines.

Ironically, however, as Hugo and others document in great gory detail, in practice, the guillotine turned out to be even more "human" than expected: That is, the machine was spectacularly more fallible, less precise, and dramatically "crueler" than her father/creator had intended. Designed to incarnate the virile attributes of rational justice, the guillotine quickly became associated with feminine bloody vengeance. The machine that was initially promoted as Guillotin's enlightened daughter became better known as "La Veuve," the widow. The nickname "La Veuve" derives from the older French expression "épouser la Veuve," to marry the widow. Prior to the invention of the guillotine, this expression was popular prison slang for capital punishment—at that time mostly by hanging. Presumably, this quintessential illustration of gallows humor played on the erotic connotations of hanging. It is not hard to understand why a condemned man would prefer to substitute the erotic pleasure of orgasm ("la petite mort") for the suffering of the moment of death ("la mort"). By depicting the moment of death through the figure of a marriage oath, the condemned man figuratively transforms the death sentence that comes from the other into a religious and legal oath that is voluntarily made to another. In its own dark way, this expression implicitly endorses the theological/political authority of the sovereign.

But in the postrevolutionary theater of death, incarnated by the guillotine, known as "La Veuve," marriage is no longer operative. "La Veuve," whom Arasse calls a "travailleuse," is a single, working woman. Her democratic spirit (she handles all men in the same way) makes her much closer to a prostitute than a wife. This figure of mechanical, industrialized labor even puts the executioner out of business. She is self-sufficient and self-supporting. *La Veuve labors*. This feminine figure is the antithesis of a mother. Her tireless daily work is, quite literally, a labor of death. After a predetermined time, the time between sentencing and execution, she delivers death, mechanically.

As Derrida points out, one of the greatest cruelties inherent in this scene of death is what happens to time. To be condemned is to be condemned to await death according to a time line that is calculated by the state. The state dictates the term that determines and culminates in the event of death. Death is expected, according to a clock determined by the various apparatuses that execute a sovereign decision.

I would like to end this discussion with a suggestion, here made very quickly, about how, throughout his elaboration of the temporality of the death penalty, Derrida consistently draws upon figures relating to birth and the time of pregnancy in ways that merit closer attention.[14] At the end

of volume 1, Derrida performatively speaks in the first person and openly declares his "interest" in abolishing the death penalty. When explaining why he deems this proclamation of interest to be so urgent, he invokes the unconditionally unacceptable cruelty inherent in the fact that the death penalty deprives me of my own death: The hour of my death is mechanically calculated and executed by the law and its prosthetic machines.

> The death penalty, as the as the only example of a death whose instant is calculable by a machine, by machines (not by someone, finally, as in a murder, but by all sorts of machines: the law, the penal code, the anonymous third party, the calendar, the clock, the guillotine or another apparatus), the machine of the death penalty deprives me of my own finitude; it exonerates me, even, of my experience of finitude. It is to some finitude that this madness of the death penalty claims to put an end by putting an end, in a calculable fashion, to some life.[15]

The death penalty transforms the moment of death into something like a monstrously mechanical birth. It has a determined or predetermined term. The bloody slutty widow is only one of several maternal machines that become associated with the cruelty of the death penalty. As Derrida points out, the United States has produced its own sanitized figure of maternal death: the telephone. Writing about the seemingly inexorable presence of the telephone as a last recourse in every cinematic representation of the death penalty, Derrida writes: "For there is always a telephone today that links, like an umbilical cord of life or death, the place of execution to the executive power of the sovereign, here that of the governor who can grant a pardon or interrupt the execution up to the last instant, up to the instant of death."[16]

Like an umbilical cord of life or death, as he puts it, the telephone is the mechanical maternal figure that connects the death scene to the law of the sovereign.[17] But this scene of death, in which the governor grants the stay of execution by placing a telephone call, just in time, that cancels the death sentence and arrests the moment of death is overlaid with its fictive, cinematic Hollywood renderings. Only in the movies does the state actually agree to cut the cord.

NOTES

1. Jacques Derrida, *The Death Penalty*, vol. 1, trans. Peggy Kamuf (Chicago: University of Chicago Press, 2014).

2. Ibid., 2.

3. Ibid.
4. Ibid., 4.
5. For several related discussions about visibility, sovereignty, theatricality, and Derrida's writings about the death penalty, see Kelly Oliver's essay, "See Topsy 'Ride the Lightning': The Scopic Machinery of Death," *Southern Journal of Philosophy* 50, Spindel Supplement (2012): 74–94, and my response to Oliver's essay: "The Elephant and the Scaffold: Response to Kelly Oliver," *Southern Journal of Philosophy* 50, Spindel Supplement (2012): 95–106. For a revised and expanded set of reflections on Derrida and the death penalty, see Kelly Oliver's book *Technologies of Life and Death: From Cloning to Capital Punishment* (New York: Fordham University Press, 2013). For other important recent writings on Derrida's Death Penalty Seminars, see volume 50 of the *Southern Journal of Philosophy* (2012) and the special issue of the *Oxford Literary Review* devoted to the death penalty: *Oxford Literary Review* 35, no. 2 (2013).
6. Derrida, *Death Penalty*, 1:27.
7. Ibid., 140.
8. Ibid., 165.
9. Ibid., 223.
10. Ibid.
11. Daniel Arasse, *The Guillotine and the Terror*, trans. Christopher Miller (London: Penguin Books, 1989).
12. Derrida, *Death Penalty*, 1:193.
13. For an important discussion about cruelty and the guillotine, see Elizabeth Rottenberg, "Cruelty and Its Vicissitudes: Jacques Derrida and the Future of Psychoanalysis," *Southern Journal of Philosophy* 50, Spindel Supplement (2012): 143–59.
14. If one were to follow up on all of the figures of pregnancy and pregnant women that run through the Death Penalty Seminars, it would be very interesting to look closely at Derrida's analysis of Kant's argument in *The Metaphysics of Morals* concerning "maternal infanticide." As Derrida explains, the figure of an unmarried pregnant woman who is compelled to kill her child in defense of her own honor occupies the position of one of two "exceptions" to the warranted and mandated application of the death penalty for Kant. According to Derrida, Kant is obliged to exempt from the justified application of the law on two counts: 1) as an unmarried pregnant woman, she is not bound by the law of marriage, and consequently 2) her child is not a citizen and hence has no protection under the law. Pregnancy is here depicted both as a figure of the death penalty and as its exception. See Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1996), 108–9.

15. Derrida, *Death Penalty*, 1:258.

16. Ibid., 49.

17. Throughout the Death Penalty Seminars, Derrida invokes the motif of the telephone. His interest in the telephone is indebted to the writings of Avital Ronell and Hélène Cixous, both of whom have written extensively about the telephone. In this passage, however, the links he establishes that connect the telephone, the mother, the state, and umbilical cord are clearly influenced by Ronell's work in *The Telephone Book*: *Technology—Schizophrenia—Electric Speech* (Lincoln: University of Nebraska Press, 1989). For a reading of Ronell's work on the telephone and related issues linking technology to the maternal function, see my book, *The Mother in the Age of Mechanical Reproduction: Psychoanalysis, Photography, Deconstruction* (New York: Fordham University Press, 2012).

CHAPTER 10

Opening the Blinds on Botched Executions

Interrupting the Time of the Death Penalty

Kelly Oliver

In the United States, taking on standards set out by the Supreme Court for legal executions, abolitionists have variously argued that the application of the death penalty is discriminatory and used disproportionately against Blacks, that innocent men are executed, and that various methods of execution constitute cruel and unusual punishment. All of these arguments, however, allow that although the practice is flawed, the principle may be sound; if only we improve and perfect the practice, then we authorize the principle. The fantasy of humane, painless, instant death, technologically administered, contributes not only to the idea of the perfection of the means of death in order to justify the principle of the death penalty but also to the fantasy of death itself as an absolute, in this case, the absolute end of suffering and pain. The Supreme Court's 2008 decision upholding the use of tripartite lethal injection—the first rendering unconscious, the second paralyzing the muscles, and the third stopping the heart—ruled that there is no cruelty in execution as long as the prisoner is unconscious while being killed.[1] This so-called clean death sterilized with high-tech medical apparatus, including IVs, syringes, and hospital gurneys, supposedly sanitizes

death; and like the surgical strike in high-tech warfare, it focuses death into an imagined instant.

The question of consciousness of death reveals an assumption at work in more humane applications of the death penalty: namely, that death happens in an instant and, moreover, that we can determine the moment of death. The fantasy is that death happens in an instant and if we can condense dying and death to the same moment, we have achieved the goal of painless, humane, death rendered in a split second so as to avoid consciousness. It is as though if we kill fast enough, we can outrun consciousness. If only we can separate dying from death and give death without also a prolonged dying. Cruel and unusual death, then, is determined by the time it takes to administer. The notion of a humane death penalty comes down to time.

In the Death Penalty Seminars, Jacques Derrida argues that the death penalty is a disavowal of finitude and always brings us back to the question of time, specifically the time of death. Rather than repeat the analysis of others in this volume that take up the issue of finitude in Derrida's seminars (see especially Rottenberg, Saghafi, and Thurschwell), I take a different tack. Following on Peggy Kamuf's discussion of why Derrida turns to literature in a discussion of a properly philosophical argument against the death penalty, I focus on the trope of bandages as they bind Derrida's analysis of the time of death and the time of penalty such that by the end, we are left with the conclusion that there is no properly philosophical argument against the death penalty, no nondeconstructable abolitionism, no principled argument, because philosophical principles as they have been articulated in our history are part and parcel of the very logic of the death penalty (see also Howells in this volume).

Here, I focus on the first appearance of the bandage metaphor in Derrida's *The Death Penalty* volume 1, and more specifically on the timing of that first time; a first time, it turns out, that is repeated. I focus on an interruption of time lodged in these bandages, which is perhaps the sign of the very possibility of changing time or of changing times. I argue that once we start to unwrap these inaugural bandages, we encounter an odd moment in the seminar, a kind of liminal moment, dangling like a detached signifier, or a stutter, that interrupts the flow of the seminar, which is already not so much flowing as constantly interrupting itself. Like a detached signifier, Derrida suggests that those bandages house an alterative temporality, perhaps an alternative to either the redemptive time of resurrection or the clock time of condemnation. Between condemnation

and resurrection lay the bandages, a sign of an in-between time, a time of interruption and repetition, an undead time, what Derrida calls "singular time that does not belong to the ordinary unfolding of time."

In this essay, I explore the bandages as a sign of this alternative notion of time, the time of deconstruction as a counter-time to the time of the death penalty—in particular, the death penalty as it operates in the United States, which is to say, a death penalty that revolves around a certain fantasy of the time of death and the possibility of instantaneous and therefore humane execution. I conclude by analyzing what we mean by "botched" executions—namely, that they take too much time, that the condemned remains conscious and therefore suffers, a suffering measured in minutes. The more time it takes, the more "botched" the execution is thought to be. Following the thread of bandages in Derrida's seminars opens up the possibility of thinking a deconstruction otherwise that invokes literature to interrupt the linear and teleological time of both philosophy and the death penalty.

"The bandages signify death," says Derrida, "the condemnation to death; when they fall away, out of use, undone, untied, untying, they signify, *like a detached signifier*, that the dead one is resuscitated."[2] *Like* a detached signifier, indicating a metaphorical relationship between signification and the bandages. But, when we follow the metonymy of bandages in Derrida's *The Death Penalty* volume 1, the bandages appear as the figure for figuration itself. More specifically, they are a sign that needs interpretation; a sign that the bandages are detached from the body; a sign that the word, or sign, is detached from the thing. Let us begin by looking at where the bandages first appear in the seminar, to what they are attached, and from what they are detached.

In the First Session (December 8, 1999, continued), Derrida begins where Jean Genet begins *Our Lady of the Flowers*, with a photograph from a newspaper of a condemned man named Weidmann, whose head is shown "swaddled in white bandages," a picture that Derrida remembers seeing as a child. Discussing the passage from Genet, Derrida immediately focuses on the religious images and sacralization of the condemned that take us back to Christ's execution on the cross. The sacred image of Christ on the cross reappears throughout the seminar, especially in Derrida's discussions of the metaphorics of Victor Hugo's abolitionism. Derrida shows how the history of abolitionism and the history of the death penalty share the same theological underpinnings and the same attachment to a value beyond embodied finite life. The bandages, then, become the first sign that both sides of the debate are tied to religion, specifically Christianity. On the one

hand, even the most secular abolitionist literature has religious undertones. And, on the other, the most rigorous philosophy cannot ground the death penalty without at least implicitly appealing to the sovereign authority of God. The death penalty and religion are bound together, represented by the bandages of the executed and resurrected Christ.[3]

Derrida suggests that we follow the metonymy of the bandages to see the connection between Christ and images of condemned men ascending to the gallows in Genet and in the 1958 film *Elevator to the Gallows*.[4] But we could just as well look to contemporary media, for example, to the portrayal of Troy Davis as a martyr whose spirituality lifted him above his impending execution, or to a recent editorial in *The Guardian* that described the condemned Dennis McGuire as Christlike with his arms spread out and bound to the gurney as if on the cross. We can follow the metonymy of these bindings, these straps attached to the table, as threads that lead from contemporary scenes of execution back to the execution of Christ.

Derrida describes Christ's bandages, lying empty by the tomb, as a signifier of both death and resurrection. He reads those empty bandages as a sign of the absent body as dead—or corpse—and gone—or resurrected. "Like a detached signifier," the bandages signify both death and the overcoming of death when they are "raised up, erected by a miracle, a divine miracle or a poetic miracle."[5] Derrida focuses on the Gospel of John where Mary Magdalene sees the empty wrappings and asks Jesus, whom she supposes to be the gardener, where they have taken the body. In this moment, the bandages signal a threat "worse than death," the desecration or disappearance of Christ's body, which Derrida compares to the disappeared in Chile or South Africa. And yet in the Gospel, they also signal a promise—namely, the hope of the messianic miracle of Christ's coming and going and coming again, what Derrida cleverly calls the "Fort/Da-sein of Christ."[6] In this moment, these dried leaves of linen are all the evidence Mary has to decipher what happened to the body; thus begins the mystery of the missing body, a thread we could follow up to scholastic debates over whether or not we will have bodies in heaven.

Not recognizing Jesus's liminal body standing before her, neither alive nor resurrected, Mary asks: "What happened to the body?" She is trying to fathom the meaning of the empty bandages. She is weeping because she interprets those empty bandages as a bad sign, but Jesus reassures her that the bandages are a good sign, a sign of his resurrection to come, of his imminent ascendance unto God. In fact, it is only because the bandages are detached that they can signal resurrection. Like a detached signifier, the meaning of the bandages is ambiguous, or at least multivalent. Certainly

this is the case with the bandages in Derrida's seminar, where he exploits their multiple meanings. The French verb *bander* means "to band," "to bandage," "to blindfold," "to tighten," and "to get an erection." And all of these meanings are operating in the seminar. And sometimes we see them pop up when we least expect. For example, in Derrida's analysis of religion, with its roots in the Latin *religio*, meaning "the ties that bind"; or the recurring theme of fascination, from *fascio*, meaning "to tense, tie, attach" (in Italian it means "bundle" or "rod," "unity," the root of the word *Fascism*), *fasciola* is wrapping or bandage; or all of his talk of filiation and blood ties, *fils* meaning "sons" and *fil* meaning "threads" in French. So many threads to follow in this text, opening onto so many promising interpretations, wrapped around the death penalty. In the space of this essay, however, I do not have time to unwrap all of these bandages.

Derrida's style is one of interruption. He repeatedly interrupts his remarks by quoting very long passages allowing the voice of the other to penetrate his own and subsequently interrupting them with his own remarks; in addition, sometimes he begins a session with a quotation, presented, as we might imagine, live in his own voice, as if they were his words, which of course they both are and are not. For example, Session Four begins with Derrida saying, "I vote for the pure, simple, and definitive abolition of the death penalty," which we find out are actually the words of Victor Hugo. The time of the seminar builds suspense as we wait to learn who is speaking. But that question—who is speaking—takes us back to Christ's tomb and the liminal figure of the undead Jesus, between condemnation and resurrection, between death and eternal life, unrecognizable, who comes along to interrupt Mary's reveries over the empty bandages.

The first instant, so to speak, of interruption, is the sudden appearance of the bandages at the very moment when Derrida takes up the question of why to begin a seminar on the death penalty with literature, presumably rather than with philosophy or legal discourse or some other principles.[7] Discussing the second apparition of the bandages in the Gospel of John, Derrida says: "The bandages do indeed *appear*; they are there all of a sudden; they leap into the light. . . . The process is very remarkable (and if we had the leisure to do so [that is to say, if we had the time], . . . we would meditate on this time of the bandages as the lodging made ready for literature, for an ascension without ascension, an elevation without elevation, an imminent but not yet accomplished resurrection)."[8] The bandages as interruption. They interrupt time. The bandages as the lodging made ready for literature. What could this mean? Like a detached signifier, those bandages house an alternative temporality, perhaps an alternative to either the

redemptive time of resurrection or the clock time of condemnation. Between condemnation and resurrection lay the bandages, a sign of an in between time, a time of interruption and repetition, an undead time, what Derrida calls a "singular time that does not belong to the ordinary unfolding of time."[9]

Biblical bandages show up again in Session Four when Derrida is discussing Blanchot's "Literature and the Right to Death." After making the debatable claim that Blanchot implicitly supports the death penalty, Derrida qualifies his analysis, not wanting to be "unjust" or "condemn" Blanchot's text to death. This is when he brings up Lazarus as another figure whose bandages signal both death and resurrection. Again, those bandages are tied to literature—perhaps too tightly for Derrida's taste—when Blanchot suggests that the object of literature is precisely what literature necessarily kills in order to exist, in other words, the thing as it exists before it is represented in language. Blanchot claims literature is the search for the moment before literature, an impossible moment, a time before time. The smelly body of Lazarus before he is resurrected, this is what literature seeks, the body in between death and resurrection. In the story of Lazarus, however, the bandages are still attached to the body, unlike the detached bandages at Christ's tomb. So too, Blanchot insists that literature is attached to the body, the missing body, which can never be recovered as it was before its resurrection in language. Perhaps, then, Blanchot's literary signifier is not detached enough from the body to offer the possibility of an alterative to the discourse of condemnation and resurrection with its redemptive temporality. With Lazarus, there is no mystery of the empty bandages, only the miracle of resurrection. Yes, literature can cling to the body. Yes, literature can proclaim its own truth and sovereignty. Yes, literature can support the death penalty. But, is there another possibility for literature, or if not literature, then the literary or poetic? What happens when the signifier becomes detached, fluid, and multivalent?

Can the literary or poetic interrupt redemptive temporalities as well as clock time with its infinite division of time into discrete, manageable moments? Is there a way in which the literary and poetic as detached signifiers offer a different time lodged in those bandages, the time between condemnation and resurrection, what Derrida calls "this singular time that does not belong to the ordinary unfolding of time," "this time without time"?[10] If, as Derrida suggests, there will always be condemnation, fueled at least in part by fantasies of resurrection, is there any time (or place) that resists being condemned to death and the phantasm of resurrection? And

could the bandages as a detached signifier offer a clue to this alternate temporality?

How might the detached bandages signal an alternative to, or time in between, condemnation and resurrection? In their second appearance in the Gospel of John, they become a sign of an in between time for Christ's body when it is already dead but not yet resurrected, a sort of undead Christ who haunts his tomb like an apparition or a ghost. The bandages signify that Christ is dead but no longer dead. We could say that he *will have been* condemned or he *will have been* resurrected, employing the future anterior tense, which reminds us that how we inherit the past determines how we live the future. This time of the future anterior is a time out of joint, always both too early and too late, which, we could say, is the time of interpretation itself.

In psychoanalytic terms, we could say that our existence as interpretative beings, or beings who mean, is a living wound resulting from the trauma of this split between being and meaning. As compensation for the loss of being—immediate and present—we have meaning, detached and absenting. This time of loss and compensation operates not according to linear clock time but rather to the time of repetition, the time of the drives, the time of Freud's condensation and displacement. This experience becomes incorporated into clock time, always with remainder, always incomplete, always with excess, as part of a story, a narrative that we tell and retell in order to make sense of things. Making sense of things both kills and resurrects those things, those bodies that we attempt to grasp through meaning. And for better and worse, we are left holding empty bandages, detached signifiers, asking what they mean and where is the body. The time of interpretation, in between time, before we know what it means, the pile of bandages lying there, signaling something, but what? In Derrida's seminar, they come to signify the time of literature itself as a time of interruption, a singular time outside of normal calculable clock time.

From the very beginning, literature appears as an interruption to philosophical justifications of capital punishment. In response to the question "Why, on the death penalty, begin with literature?" Derrida immediately presents a hypothesis: Modern literature, in spite of its heterogeneity on the issue, is decidedly abolitionist.[11] He is quick to point out that although there are many writers who take abolitionist stances, and others who do not, what is unique about literature is not just that its modern history includes abolitionists but rather that its modern history is also essentially the history of "a desacralization" that breaks with biblical notions of for-

giveness and, we might add, biblical notions of divine authority, sovereignty, and truth.[12] As Peggy Kamuf argues in her essay in this volume, Derrida links this desacralization with the birth of the novel and fiction, which is associated with irony rather than the sacred and with self-referentiality rather than an appeal to a transcendent authority or God. With fiction, we could say that the signifier becomes detached from transcendent authority and transcendent sovereignty. Fiction destabilizes the proper or the properly philosophical principle.[13] Implied in Derrida's analysis is the bond between detaching the signifier from transcendent truth and abolishing the death penalty.

How, then, does the literary or poetic interrupt both redemptive temporalities and clock time? As Derrida writes in the margin of the typescript of Session One, "No philosophy against the death penalty," which echoes his remarks in *For What Tomorrow* that "no philosophical discourse as such, and in its philosophical systematicity, has ever condemned the death penalty" and that therefore "an abolitionist discourse based on pure principle has yet to be elaborated."[14] Using the hyperbolic rhetoric of "never before," which makes uncanny appearances throughout his later work, Derrida claims that never before has a philosopher qua philosopher made a principled argument against the death penalty. Certainly, this "fact" would be a good reason to start an analysis of abolitionist discourse with literature.

But, I think that perhaps there is a deeper reason to begin with modern literature and not modern philosophy when it comes to the death penalty, a reason that revolves around those bandages as detached signifiers. Perhaps the literary and poetic, rather than literature as a discipline per se, could be modes of reading and writing, rather than a corpus. When writing becomes a corpus, it is dead, canonical, like a sovereignty based on principles. But, literary and poetic sovereignty, what Derrida calls in *The Beast and the Sovereign* "poetic majesty," might offer an alternative insofar as it demands ways of reading and writing that open up rather than close off possibilities. Yes, the literary and poetic can seduce, but as Derrida's Blanchot argues, it can never seduce absolutely; unlike philosophy, at its best, it seduces with its fluidity rather than its rigidity. Perhaps a certain poetic or literary sovereignty can resist the fantasy of sovereign mastery insofar as it requires interpretation and reinterpretation, insofar as it does not *erect*, or resurrect, itself as the one and only, the grand master, the sovereign truth or principle. Even if it makes those bandages stand out, stand erect, or band erect, as *bander* is translated in *Glas*, literature is unable to erect itself as the one true transcendental signifier attached to all others the way that philosophy has done.

Whereas modern literature—or perhaps I should say the literary or poetic—gives us figures and fantasies as such, wrapped up in so many bandages, suggesting both death and resurrection but never, in fact, delivering either, modern philosophy mistakes the bandages for the body in itself. Simply put, if modern literature with the invention of the novel presents itself as fiction, philosophy presents itself as truth. Refusing to accept the multivalent mystery of the bandages, with their ambiguous meanings, modern philosophy insists on finding the body in itself, stripped bare. Whereas modern literature with the birth of the novel gives an ironic view of true believers—think of Don Quixote—modern philosophers remain true believers. With their absolute faith in reason, modern philosophers from Descartes to Kant ground knowledge and right on reason. The sovereignty of God gives way—barely—to the sovereignty of reason. Paradoxically, reason operates according to strict scientific principles of accounting such as Descartes's geometry, which divides space and time into infinite units, or Kant's lex talionis, which demands a punishment equal to the crime, all the while being founded on intuition or unreason. Think of Descartes's clear and distinct ideas or Kant's claim that in the case of murder it is obvious that capital punishment is the right punishment.[15] Indeed, the intuition that a death for a death is an absolute equivalence—that death, as Kant says, is the great equalizer—becomes both the prime example of lex talionis and its justification.[16] In the case of murder, then, no rational calculation is needed because the punishment is obvious.[17] Reasoning is unnecessary because it is obvious; reason based on intuition. Reason based on faith. Faith and knowledge, as Derrida suggests, are two sides of the same coin or, as Michael Naas puts it, two sides of the same sovereign.[18] In sum, philosophy continues to look for the sovereign principle, the philosophical argument based on pure principles, that is to say, precisely the kind of argument Derrida insists is missing when it comes to the abolition of the death penalty.

If we accept Derrida's claim that there is no principled philosophical argument against the death penalty, then it makes sense that he would look to literature for abolitionism. But what if the principled argument itself is part and parcel of the logic of sovereignty that supports the death penalty? What if it is the true believers, on both sides of the debate, who threaten the worst violence? What if it is the belief in universal principles itself that gives rise to the most dangerous aspect of the most rigorous argument in favor of the death penalty? Of course, in the case of Kant, Derrida turns these very principles against Kant's conclusion in favor of capital punishment to the point of suggesting that perhaps Kant's argument is abolition-

ist after all insofar as the strictness of his criteria against self-interest and for equivalence are impossible. The principled argument, then, is always a deconstructable argument.

If, as he suggests in *For What Tomorrow*, Derrida is looking for a nondeconstructable abolitionism, perhaps what he shows is that there is not one. Paradoxically, the only philosophical argument for abolition that is immune to deconstruction would be a deconstructive argument, but only when it is always deconstructing itself. There is no properly philosophical argument against the death penalty and even if there were, it would necessarily follow from the same logic supporting the scaffolding of the death penalty. The only properly philosophical abolitionism, then, is not proper at all but rather the ongoing deconstruction of both principles and arguments on both sides of the debate over what is right. In order to dismantle the scaffolding of the death penalty, sovereign principles on both sides must be deconstructed. Derrida's *The Death Penalty* volume 1, shows this much, even if it does not say so explicitly.

Here is an outline of some of Derrida's implicit, if not explicit, arguments against the death penalty:[19]

1. Insofar as the sovereignty of the sovereign is groundless unless grounded on God, there is no nontheological, strictly legal or political, grounding for the state's right to give life or death. That is to say, political sovereignty is grounded on theological sovereignty, which breaches any attempts to separate Church and State. The upshot is that the state cannot ground its authority to give and take life except by appealing to a higher power.
2. The law cannot ground itself legally. The death penalty is the prime example of this illegitimate and autoimmune logic whereby the force of law or sovereignty—"might makes right"—is its only "principle" and it is the keystone, the weld, the cement that holds it together. Again, the law necessarily appeals to an extralegal justification for the death penalty, which it legitimates through force. The law itself cannot provide an internally coherent argument for capital punishment. For example, the law cannot prohibit killing and then give itself the legal right to kill. Alternatively, the law cannot justify its own killing without justifying killing more generally.
3. Thus, there is a contradiction at the heart of the principle that argues for the death penalty on the basis of the sanctity of human life—whoever kills should be killed. This principle operates according to an autoimmune logic that destroys itself when the

state violates the sanctity of human life by killing. On this logic, the death penalty can only be justified as an exception, in which case the law against killing is suspended in the name of law. However, if the death penalty is grounded on the exclusively human right to give death, it falls prey to the same autoimmune logic. The right to death becomes "the law that gives birth to law," that is, once again, to say it becomes the extralegal force of law. In sum, there is a contradiction at the heart of legal capital punishment. The performative force of law, sovereignty's claim to the right to give life and death, is always outside of the law, extralegal, illegal, or outlaw.

4. Moreover, abolition may be a cover for the illegitimacy of sovereignty's claims to control the lives and deaths of its citizens, since the death penalty is the most brazen example; without it, sovereignty more easily gets away with its "might makes right" in the name of democracy, freedom, security, etc. This is to say, abolition of the death penalty may operate to conceal the myriad ways in which the state sentences individuals and populations to death apart from executing them, for example, through inadequate health care, poverty, or imprisonment.

Of course, Derrida complicates matters by demonstrating that even modern secular abolitionist literature cannot escape religious imagery and appeals to sovereignty, authority and truth, or a beyond life. It cannot escape identifying the value of human life with something beyond this earthly embodied finite existence. In other words, even secular literature cannot resist the appeal of fantasies of controlling or overcoming death through, among other things, resurrection. Redemptive time makes its way into literature. In addition, as if to add insult to injury, secular humanism appeals to science as an alternative to redemptive temporality but still in the service of the death penalty. These humanists, such as Dr. Guillotín, put their faith in science to provide an instant, and therefore humane and pain-free, death that justifies the continued use of capital punishment. Throughout *The Death Penalty* volume 1, Derrida suggests that the ultimate cruelty of the death penalty is that it disavows earthly embodied finite existence and attempts to master the time of death not just through fantasies of resurrection but also with machines, like the guillotine, that divide time into moments so infinitesimal that they seemingly do not take any time at all.

The question becomes how to interrupt both redemptive temporality and mechanized clock time insofar as they are put into the service of the

death penalty. Fantasies of redemption through resurrection trade this life for the next and sacrifice finitude to eternal life, while the Cartesian notion of time as infinitely divisible into discrete moments perpetuates the fantasy of instant death. Both the time of resurrection and the time of instant death stand opposed to the time of life as lived, embodied, and finite. Both are attempts to control what cannot be controlled—namely, life and death. The fantasies of eternal life and infinitely divisible instants are constantly trying to override what Derrida calls "the principle of indetermination" by determining the time of death and the certainty of an afterlife. The principle of indetermination, as we will see, is a strange principle, an unprincipled principle, the interruption of all principled principles.

"Like a detached signifier," this phrase is itself dangling in Derrida's first session like a temptation or mystery, seemingly detached from his musings on those bandages wrapped around the heads or bodies of the condemned. At this very point in the text, an editorial note tells the reader that the First Session ended one sentence after the passage with which I began, when Derrida runs out of time and stops, seemingly abruptly. The end of the lecture comes where he does not expect it, when the clock signals time is up. In a sense, Derrida interrupts himself to stop the lecture before he is finished.

These bandages, then, also flag an odd moment, a sort of limbo, between the time of the body speaking and the pages that now signal the absence of that body—Derrida's body—as both dead and yet haunting the text with his "notes to self," so to speak, and various stage cues to guide his performance. These bandages mark a time out of joint, a disjunction, an interruption, which signal both the absent body of our author and his presence insofar as it haunts the dry leaves of the book, which he both wrote and never wrote.[20] The leaves of this published book, and phrases, "like a detached signifier" are like the bandages, like the scraps, that make us ask where the body is. This moment makes apparent the way in which Derrida's execution, his performance, is subjected to the clock, which determines its end.

Yet, the bandages also mark a repetition. Derrida repeated verbatim the last paragraph of what he presented in the First Session at the opening of the next session, thus repeating, "The bandages envelop, attach, they tie but also become detached: They become untied from the body proper." The editors call this a "disjunction" between the recordings and the typescript when the performance of the seminars was out of sync with Derrida's written versions of the seminars up until the Third Session.[21] Suspended, then, between what appears in the published text as the "First Session" and

what appears as the "*First Session Continued*," which is really between the first and the second meeting of the seminar, are these bandages whose repetition shows up on the recordings but is missing in the published text. In this book with twelve chapters but only eleven sessions, and two sessions "ones," time is out of joint. This is an odd way of counting, the *First Session Continued* as something in between Session One and Session Two, its strange status operating like an interruption of the twelve-hour clock, and eventually stopping the seminar with the eleventh, the eleventh hour, signaling that time is running out, the eleventh hour when that call from the governor might come to interrupt the execution and stop the hands of the clock ticking mechanically toward the time of death of the condemned.

This accident of the clock—Derrida ran out of time to read all of his lecture notes—points to some of the most fascinating parts of the Death Penalty Seminars: namely, Derrida's discussion of time, the death penalty's attempt to control time and end finitude, and the cruelty of the clock as the last and most brutal stroke of state-sponsored killing machines. It becomes clear throughout the seminars that for Derrida, it is about time.

This time between Derrida's execution of the lecture and the book that is left like so many dried pieces of linen is perhaps the lodgings for an abolitionist literature that interrupts the discourse of the death penalty, not by providing that much awaited and sought after "principled" or properly philosophical argument against the death penalty but rather by "deconstructing" the death penalty with and against the possibility of principled or properly philosophical arguments. In other words, in this text, literature appears as an interruption in the discourse of the death penalty that, like the bandages, reveals the impossibility of a principled argument against the death penalty. If, as he suggests in *For What Tomorrow. . .* , Derrida is looking for a nondeconstructable abolitionism, perhaps what he shows is that one does not exist. There is no properly philosophical principled argument against the death penalty. Any philosophical argument necessarily follows the same logic supporting the scaffolding of the death penalty. Deconstruction is the most appropriate philosophical response to the death penalty and must be applied to both abolitionist arguments and those supporting capital punishment.

For Derrida, it is about time. The cruelty of the death penalty is about time; more specifically, it results from a notion of time that can be measured by the clock, a divisible notion of time measured in units, akin to the measurement of units of various drugs now used in lethal injections in the United States. Derrida says, "what we rebel against when we rebel against the death penalty is not death, or even the fact of killing. . . . It is against

the calculating decision, not so much the 'you will die' . . . but . . . you will die on such a such a day, at such and such an hour, in that calculable place, and from blows delivered by several machines, the worst of which is perhaps neither the guillotine nor the syringe, but the clock."[22] The clock, then, is part and parcel of the machinery of death and perhaps its most dangerous part. The death penalty kills the condemned, but the logic of the death penalty kills time.

By cutting up and killing time, this Cartesian logic of divisible units and calculation guarantees that the death penalty will continue even after it is abolished. This logic undergirds the fantasy that we can make clean cuts between indemnity and condemnation, between humane and cruel, between alive and dead. This logic of divisibility reassures us that we can accurately make the cut where it belongs and thereby control the process of death. And this fantasy of control and sovereignty guarantees that, as Derrida says, "the death penalty will survive, it will have other lives in front of it, and other lives to sink its teeth into."[23] It is just a matter of time.

The logic of calculation kills time in at least two ways. First, by setting the time of death, the death penalty denies the finitude of embodied existence. The death penalty operates with the fantasy that we can control the time of death and thereby perhaps death itself. Second, the modern institution of capital punishment, which originates with the invention of the guillotine as a more humane way to kill, divides time into discrete moments in order to control the time of death down to the instant of death, wherein instantaneity becomes the criteria for pain-free and cruelty-free death, such that Derrida says "the guillotine is not just a killer, it's a painkiller."[24] It kills pain, by killing time, by offering instantaneous death. The supposed lack of time that the condemned spends dying is what makes the execution not cruel. This reasoning holds that if we can identify and locate the instant of death and make it take no time, then death is humane.

The same could be said of lethal injection in the United States, where the goal seems to be rendering the condemned unconscious and then killing him quickly, as if in his sleep. The significance of reducing the time spent dying and offering instant death is evidenced by reports of so-called "botched" executions. Austin Sarat defines a botched execution as "a breakdown in, or departure from, the 'protocol' for a particular method of execution. The protocol can be established by the norms, expectations, and advertised virtues of each method or by the government's officially adopted execution guidelines. 'Botched executions are those involving unanticipated problems or delays that caused, at least arguably, unnecessary agony for the prisoner or that reflect gross incompetence of the executioner.'"[25]

It is noteworthy that we measure the breach of protocol in terms of minutes. A "botched" execution takes time, whereas a first-rate execution takes no time at all. "Botched," then, does not refer to execution itself since in nearly all of these cases the condemned ends up dead but rather to the time that it takes for the condemned to die. His suffering, or the cruelty of the punishment, is measured in the number of minutes it takes, which is why central to every news report of a "botched" execution is the exact number of minutes that it took for the condemned to die. In *Gruesome Spectacles: Botched Executions and America's Death Penalty*, Austin Sarat concludes that 7 percent of all executions using lethal injection are "botched." For example, most recently, Brian Keith Terrell in Georgia, over an hour; seventy-two-year-old Brandon Jones in Georgia, over an hour; Joseph Rudolph Wood in Arizona, one hour and fifty-seven minutes; Clayton Lockett in Oklahoma, forty-three minutes; Dennis McGuire in Ohio, twenty-five minutes; William Happ in Florida, fourteen minutes, etc.[26]

A so-called botched execution reminds us that we cannot control the time of death and, moreover, that dying takes time. Even as cruelty is measured in clock time, botched execution pulls back the blinds on our inability to give instant, pain-free death, our inability to kill time. In this regard, when the wardens pulled the curtains on the windows around the death chamber when Clayton Lockett's execution went wrong, those blinds covered up what was going on behind them while they revealed our inability to control death or the time of death. These curtains around the death chamber act as bandages, blindfolds, which cover over cruelty as part of what Derrida calls the anesthetic logic of contemporary capital punishment. And yet, as Derrida asks, speaking again of Christ, how do we measure the agony of the condemned? As the minutes ticking away in every botched execution pull back the blinds on the inadequacy of measuring suffering in terms of clock time, they point back to the incalculable time of the empty bandages, the time of interruption, the eleventh hour, that promises to stop the clock before it is too late.

NOTES

1. *Baze v. Rees* (Roberts opinion), 533 U.S. (2008), 35. Certainly the number of botched hangings, electrocutions, and even lethal injections indicates that even advanced technologies cannot insure a pain-free instant death or guarantee that the victim is unconscious at the time of death. In fact, a study of postmortem examinations on prisoners executed by lethal injection concludes that given blood levels of anesthetic, "prisoners may have been capable of feeling pain in almost 90% of cases and may have actually been

conscious when they were put to death. . . . Because a muscle relaxant was used to paralyze them, however, inmates would have been unable to indicate any pain" Alison Motluk, "Execution by Injection Far from Painless," *New Scientist*, April 14, 2005, http:// www.newscientist.com/article/dn7269-execution-by-injectionfar-from-painless.html. See also Austin Sarat, *Gruesome Spectacles: Botched Executions and America's Death Penalty* (Stanford, Calif.: Stanford Law Books 2014).

2. Jacques Derrida, *The Death Penalty*, vol. 1, trans. Peggy Kamuf (Chicago: University of Chicago Press, 2013), 34.

3. For an alternative reading of the place of literature as beyond theology, see Peggy Kamuf's contribution to this volume.

4. Derrida, *Death Penalty*, 1:33.

5. Ibid., 34.

6. Ibid., 37.

7. Ibid., 29.

8. Ibid., 34.

9. Ibid., 37.

10. Ibid.

11. For a sustained analysis of the question of "Why literature?" see Peggy Kamuf's essay in this volume. See also Michael Naas, "The Philosophy and Literature of the Death Penalty: Two Sides of the Same Sovereign," *Southern Journal of Philosophy* 50, no. 1 (2012): 39–55.

12. Derrida, *Death Penalty*, 1:30.

13. Rowena Braddock, "Animot/Animaux Passion: Human Tales of Being Confounded," presented at the Derrida Today Conference, New York, May 2014.

14. See Derrida, *Death Penalty*, 1:17n25; see also Jacques Derrida, *For What Tomorrow . . . : A Dialogue*, interview with Elisabeth Roudinesco, trans. Jeff Fort (Stanford, Calif.: Stanford University Press, 2004), 88.

15. "We are rational to the extent that we have the death penalty, and we are not yet rational to the extent that we need to have the death penalty." Geoffrey Bennington, "Rigor, or Stupid, Uselessness," *Southern Journal of Philosophy* 50, no. 1 (2012): 35.

16. "There would be no more law, and above all no criminal law, without the mechanism of the death penalty, which is thus its condition of possibility, its *transcendental*, if you like (at once *internal*, included: the death penalty is an element of criminal law, one punishment among others, a bit more severe to be sure; and *external*, excluded: a foundation, a condition of possibility, an origin, a non-serial exemplarity, a hyperbolic, a more and other than a penalty). It is this, the death penalty's paradoxical effect of transcendentalization, that a consistent abolitionism must take on." Derrida, *For What Tomorrow*, 142.

17. Geoffrey Bennington astutely describes this paradox. See "Rigor, or Stupid, Uselessness," 20–38.

18. See Naas, "Philosophy and Literature of the Death Penalty."

19. See Christina Howell's essay in this volume for a sustained discussion of the paradoxes of sovereignty inherent in capital punishment.

20. We might even say that this paragraph on the bandages, suspended in between two sessions, repeated twice in the seminar, has something in common with those detached bandages, repeated twice in the Gospel of John, that signal a time in between death and resurrection when Christ's missing body appears as an apparition of sorts to the weeping Mary. This suspension or disjunction of time between the performance and the text, and between the recording and the typescript, that, like Mary, sends the reader looking for the missing body, but neither the dead body, the corpse, nor the resurrected body, the corpus, but the living, bleeding, breathing body speaking the words that we are left to read, except for the few who have access to the recordings. Perhaps Derrida is right to suggest that Christology haunts all of Western philosophy and literature, since this line of thought binds together the missing body of our author, Derrida, and the missing body of Christ from the Gospels. The bandages seem to tie them together.

21. Derrida, *Death Penalty*, 1:28.

22. Ibid., 1:256.

23. Ibid., 1:282–83.

24. Ibid., 1:226.

25. Austin Sarat, *Gruesome Spectacles: Botched Executions and America's Death Penalty* (Stanford, Calif.: Stanford University Press, 2014), 5. See also Marian J. Berg and Michael L. Radelet, "On Botched Executions," in *Capital Punishment: Strategies for Abolition*, ed. Peter Hodgkinson and William A. Schabas (Cambridge: Cambridge University Press, 2004), 145–46.

26. For a sustained discussion of the fantasy of instant death at work in lethal injection, see Kelly Oliver, "Death as Penalty and the Fantasy of Instant Death," *Journal of Law and Critique* 27, no. 2 (June 2016): 137–49. For a history of botched executions, see Sarat, *Gruesome Spectacles*.

PART IV

Derrida and Capital Punishment in the United States

CHAPTER 11

Furman and Finitude

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The impossible task of this seminar is this: to break this alliance,
this symmetry between abolitionism and anti-abolitionism
where finally each of them needs the other.

—JACQUES DERRIDA, *The Death Penalty* volume 1

Finitude

We are finite beings. We are finite because we are mortal; we will die. We know that with absolute certainty. But we do not know when, or where, or why we will die. Ever-improving medical technologies can stave off death in an unprecedented manner; and we have found more and more ways of killing others with pinpoint accuracy. No degree of precision, however, can guarantee the time and place of death—life support is unplugged and yet the patient lives on; drone pilots miss their mark. And why some lives are lost while others continue—the ultimate mystery of death—has always been understood as a matter of divine and not human knowledge or, in what amounts to the same thing, a matter of nature and chance to which the question "Why?" does not apply. Finitude thus ultimately lies not just in the fact that we will die but in our lack of mastery over that fact. Death remains beyond knowledge and the power of human calculation, which has in so many other ways reduced nature to its control.

In *Being and Time*, Martin Heidegger interpreted this unmasterability as the fundamental condition of human-being-in-the-world and ontological

basis for our comprehension of death.[1] Heidegger's analysis had been a repeated object of Jacques Derrida's critique prior to the Death Penalty Seminar he delivered in 1999 and 2000, and he returned to it again in the seminar, although only briefly.[2] As my epigraph suggests, Derrida's primary goal in the seminar lay elsewhere—an investigation into the conceptual structure supporting capital punishment with the practical aim of its eventual abolition. Nevertheless, as I attempt to show in what follows, a critique of Heidegger's existential analysis lies at the center of the seminar's intention—a largely implicit demonstration that "the phenomenological or existential analysis of temporalization, far from being simply applied in the case of the death penalty, found in the experience (without experience) of the death penalty its test case, its touchstone, or its stumbling block, its *skandalon*."[3] As I also attempt to show, this *skandolon* sheds more light on the possibility and meaning of abolition and on the current state of capital punishment than Derrida himself perhaps realized.

The essay is structured as follows: First, I present Derrida's notion that it is the ontical phenomenon of the death penalty, not Heidegger's ontological analysis, that best expresses our precomprehension of the meaning of death. Next, I explain the central paradox of contemporary abolitionist discourse that Derrida confronts in the seminar: the fact that the fundamental values supporting abolitionists' philosophical arguments lie equally on the side of the death penalty. I then develop Derrida's resolution (although "resolution" is a misnomer) of this paradox by drawing out his deconstruction of Heidegger's analytic of death (what I call Derrida's "quasi-existential analysis"). After this, I place this analysis in relation to Derrida's writings on law more generally and to the United States Supreme Court's current death penalty jurisprudence in particular. Finally I suggest that, notwithstanding the weight of its theoretical apparatus, his resolution of the paradox is best understood in terms of praxis.

Phantasm and Fascination

In the face of our anxiety before finitude, Derrida argues, the death penalty exerts a fascination because it offers a vision of death brought completely under the control of human calculation. Not God or chance but the rational process of law decides whether death will occur and, if so, its time and place. His point is that the ultimate threat of capital punishment—the power to declare that "you will die on such and such a day, at such and such an hour, in [a] calculable place"—is at the same time a promise, a promise of finitude brought within human control.[4]

Although Derrida does not dwell on this aspect, beyond its "where" and "when" the institution of the death penalty purports to calculate death's "why" as well by determining through rational processes that the condemned person deserves to die. As he points out, suicide and murder similarly appear to guarantee control, and therefore certainty, of the moment of death.[5] Murder is death delivered by the other, and suicide is death delivered by the judging self—the other internal to every self.[6] Neither endows death with a moral certainty beyond the certainties of time and place, however. Within the triad, capital punishment appears as the *Aufhebung* of suicide and murder, death imposed by the other on the basis of a judgment grounded in something beyond the sensibility of an individual subject—in Hegelian terms, the objective rationality of the law, in which individual moral sensibility is absorbed and superseded in the state. That is why Derrida can say that the sovereign prerogative of capital punishment is "the hyphen in the theologico-political."[7] More clearly than any other, the death penalty is the moment in which the all-too-human political sovereign purports to usurp the ultimate mystery of divine judgment—our condemnation to mortality—for its own.

To a mortal being, this possibility of control over the fact and meaning of death is fascinating. Indeed, that possibility seems to promise the end of finitude itself. In Derrida's words, we are "fascinated by the power and by the calculation, fascinated by the end of finitude, in sum, by the end of this anxiety before the future that the calculating machine procures. The calculating decision, by putting an end to life, seems, paradoxically, to put an end to finitude; it affirms its power over time; it masters the future; it protects against the irruption of the other."[8] To be sure, Derrida adds, "an end will never put an end to finitude, for only a finite being can be condemned to death," and thus "this calculation, this mastery, this decidability, remain phantasms."[9] Nevertheless, the possibility is riveting, no matter how phantasmatic.

Indeed, Derrida argues that as mortals, we are all necessarily invested in this fantasy because it promises an end to our finitude, even if not to our mortality. "Since this experience is constitutive of finitude, of mortality, . . . this phantasm is at work in us all the time, even outside any real scene of verdict and death penalty, . . . we 'recount' this possibility to ourselves all the time, and a calculating decision on the subject of our death cherishes the dream of an infinitization and thus of an infinite survival."[10]

The paradox of this "infinitization and . . . infinite survival" is that it can only manifest itself in the vanishing point of a temporal instant. Only by reducing dying to a point on a time line that divides life from death can we

imagine it as fully subjected to rational calculation, and therefore control. That is why we dream of the moment of death—death in general—to look like the calculated moment of execution (again, calculated not only as to time and place but as to moral meaning as well). Only in that way can we continue to dream of immortality in the form of an infinitization, if not of unending mortal life. (The resonance of this notion with the Christian doctrine of salvation as an eternal afterlife spent in the presence of God should be clear.)[11]

Derrida thus argues that our fundamental concept of death, death as such, Dasein's own-most possibility, is derivative of this fantasy of calculable certainty, of which the death penalty is a privileged exemplar. The death penalty is not a rare and exceptional instance of the general phenomenon of dying; it is rather the death penalty—or its form, call it the arche-death penalty—that determines our concept of dying.

That does not mean that that concept originates in a causal sense (or any other sense) in the institution of capital punishment. As we will see, one of Derrida's objections to Heidegger is his claim that there is a privileged or authentic account of death. Derrida's point is rather that juridically decided killing is a privileged exemplar of the investment in the punctual certainty of death that—however phantasmatic that certainty may be—underwrites our received understanding of "dying" as the instantaneous and absolute separation of life from nonlife, being-there from nonbeing. In that sense, the phantasm has quasi-ontological status—it is the most authentic form of our inauthenticity, so to speak—along with being our most powerful psychosocial cathexis.[12] Capital punishment is the secret truth of what we talk about when we talk about death, the form of the precomprehension that enables our entire discourse of death whether in everyday usage or in fundamental ontology.

The "Classic Philosopheme" of the Death Penalty

If capital punishment is the truth of what we mean by death, it is also the truth of human life, or at least the life that has been deemed truly human by the philosophical tradition. The death penalty, Derrida says, is what "welds" ontology, political theology, and sovereignty to "what is 'proper to man,'" which is to say, the element of human being that partakes in the incalculable dignity of the moral law, or the ethical substance of the community, or the other criteria that have marked the distinctively human in that tradition.[13] This is a paradox, because "dignity" is generally treated as the philosophical trump card in the abolitionist deck. The most powerful

defenses of the death penalty, however, also cite life's incalculable value and dignity; indeed, they hold that the death penalty is the paradigmatic affirmation of that dignity. Specifically, what Derrida calls the "classic philosopheme of all the great right-wing philosophies that have favored the death penalty" has been the historical network of theses holding that the humanity of the human, what is "proper to man," is what is better than the mere life in him (I will say "him" in this context because, classically, the feminine has been consigned to the side of natural life)—"what raises *homo noumenon* above *homo phaenomenon*."[14]

In this tradition, the institution of the death penalty is a supreme exemplar of respect for human life, indeed the ultimate test of humanity's self-conscious affirmation of its own humanity, because it constitutes the deliberate sacrifice of man's mere animal life for the sake of his spiritual essence. In imposing criminal punishment—paradigmatically, capital punishment—the community of moral beings restores the dignity of the condemned by making her suffering the vehicle for affirming the moral law and restoring the legal-ethical fabric of the community. The same logic appears in every theory of criminal law that justifies criminal punishment as "balancing the scales of justice." (Derrida devotes a substantial portion of the seminar to Nietzsche's genealogical critique of the lex talionis and its derivatives.)[15] That is why every abolitionist appeal to the capital defendant's inherent dignity can be countered with an appeal to the victim's equally inherent dignity, which can only be redeemed, the argument goes, when the murderer meets the same fate. Human dignity, the value of human life *as such*, lies equally on both sides of the abolitionism debate.

The "classic philosopheme," moreover, inscribes the form of the death penalty in the concept of law itself. As Derrida puts it, "the very idea of law implies that something is worth more than life and that therefore life must not be sacred as such; it must be liable to be sacrificed for there to be law."[16] In the philosophical canon, the idea of law—law as the diktat or expression of sovereignty—requires in principle that the mere life of man be subject to sacrifice for him to assume the position of legal subject. As a moral being, man is sovereign, he gives himself the law, only at the price of sacrificing his merely empirical existence (by "rais[ing] *homo noumenon* above *homo phaenomenon*," as Derrida puts it).[17] As a political being, he gains the law only by putting that existence at the disposal of the political sovereign. His mortal life becomes, in Rousseau's words, "something that he holds, on terms, from the State."[18] Thus, when Derrida says that "the possibility of the death penalty . . . belongs to the structure of the law" and "the concept of law itself would not be coherent without a death penalty,"

he is restating an understanding that includes not only Rousseau and Kant (whom Derrida discusses at length) but also, for example, John Locke, who derived the sovereign's right to make and enforce law in general from its right to impose capital punishment.[19] Because it is the exemplary instance of political sovereignty's defining *legal* right to resort to lethal violence, capital punishment, Derrida says, is the form of "the quasi-transcendental condition of criminal law or of law in general."[20] That states do not always choose to exercise that inherent right in the specific form of judicially mandated killing does not affect this analysis, which addresses law's condition of possibility, not its particular manifestations. Even abolitionist states retain the right to employ lethal force against armed felons, foreign enemies, and in many other situations, however conditioned that right may be,[21] which is one of the reasons Derrida says, "even when the death penalty will have been abolished . . . it will survive; there will still be some death penalty."[22]

As much as the concept of human dignity, the "concept of law" is one that neither retentionists nor abolitionists can do without—retentionism because it requires positive law to mandate judicial killing in particular cases and abolitionism because it requires the negation of positive law, either by a higher law (constitutional or divine) that overrides it or through legislative repeal. If law and human dignity lie at the heart of both abolition and retention, Derrida therefore asks, is there another philosophical ground for opposing the death penalty, one that does not support it as well? The epigraph makes clear that that is what he is seeking. If he calls that search an "impossible task," one must keep in mind that in the Derridean idiom "impossibility" is the signifier of ethical responsibility as much as futility.[23]

Dignity, or l'avenir*?*

Derrida's solution is to reconceive the value of life in different terms: the condition of having a future. He thus shifts that value from human life's spiritual essence to the futurality of its future, a future that is negated when death becomes a calculable decision. More precisely, he argues that to be alive is to be open to an open and unknowable future-to-come. Derrida distinguishes, as he always does, this to-come, *l'a-venir*, from the future as an anticipated series of present moments, moments imagined on the model of immediate present experience and that therefore, in principle, are conceived as knowable. L'avenir, by contrast, is the literally inconceivable future, a future that does not lie before a life as a projected hypothetical

experience, because any projection, whether it takes the concrete form of a particular experience or the a priori form of experience in general, is knowable—"calculable," in Derrida's usage—as a true future cannot be if it remains true to its principle. In fact, for Derrida, l'avenir does not "lie before" a life at all; rather, it belongs to life in the same way that the "not yet" belongs to Dasein in Heidegger's existential interpretation, as an ontological category of what it means to be Dasein as such.[24]

Paradoxically, this absolute future can only arrive, if it arrives, to a finite being. "Only a living being as finite being can have a future, can be exposed to a future, to an incalculable and undecidable future that s/he does not have at his/her disposal like a master and that comes to him or to her from some other, from the heart of the other."[25] For Derrida, as for Heidegger, the condition of having a future is inseparable from finitude. For Heidegger, the authentic future is constituted by the projection of death as my own-most and ultimate possibility. That possibility is the possibility of an impossibility, the possibility of being-there's not-being-there. As such, it is unique among Dasein's projected futures, the only one that does not represent the "possibility of" a particular project (which always presupposes Dasein's being-there) but only "possibility" itself. Confronted with death, then, Dasein recognizes its own-most being as pure potentiality-for-Being—that is, as a being that projects itself into what lies ahead of itself, a being with a future.[26]

For Derrida, however, the authentic future is not a projection, a possibility, or my own. If my finitude lies in the fact that someday I will die, that finitude does not lie in the possibility of that day but in the impossibility of projecting when or how or why that day will fall. The death verdict may be rendered, the appeals exhausted, the defendant strapped to the gurney, but the governor's pardoning phone call can still arrive at the last second, like the arrival of the Russian soldier who interrupts the narrator's execution in Maurice Blanchot's "The Instant of My Death."[27] (And the ambulance may arrive before the would-be suicide's heart stops beating.) It is for that reason that there can be no "instant of *my* death"; pace Heidegger, there is no death I can call my own. "It is the other who determines the instant of my death, never I."[28] Put another way, a future from which projection is excluded cannot, in principle, originate from a self, including the self that Dasein becomes by resolutely anticipating its own death. A genuine future, a future that is true to its essence as that which is absolutely incalculable, cannot be anticipated. It can only come, if it comes (no future is guaranteed), from what is absolutely other to the self, "from the heart of the other."[29]

As this language suggests, what is at stake between the notions of "the future" as l'avenir and as projected possibility is the relationship of the ethical other (*l'Autrui*, the other in the nonnormative sense of Emmanuel Levinas's ethics of responsibility) and the ontological self-relation (Heidegger's "own-mostness," *Jemeinigkeit*). In Heideggerian phenomenology, the future is part of Dasein's own ontological structure, the element through which it exists as potential-for-being and the medium in which, via the projection of death, it assumes its own-most individualized being. For Derrida, by contrast, the future is not ours or part of us; we owe it to the absolute other. That is, we only have a future in which to project our possibilities thanks to the eventuality of an incalculable unknown that we cannot predict or control, to which nothing can be ascribed—least of all "existence" or "possibility"—and that we betray even by presuming to name (including by giving it the name "other").[30] That debt to absolute alterity precedes all projections and anticipations and constitutes, in the first instance, the space of temporality that allows Dasein to project its possibilities and anticipate its uttermost possibility, death.

This does not precisely contradict Heidegger's analysis; there remains a sense in which the anticipation of death as the possibility of its impossibility is what discloses to Dasein its "own-most authentic Being."[31] Derrida's point is that that anticipation, and therefore that Being, presupposes an anterior dimension of debt to the other in which death signifies not an uttermost possibility but the impossibility of all disclosure, the dimension of l'avenir. Beyond, beneath, or before the face-to-face confrontation with death through which Dasein gives itself to itself lies an obscure transaction in which alterity grants Dasein its potentiality-for-Being through a gift of death that cannot be calculated or anticipated.[32] That structure of debt (and therefore responsibility) to the other is inseparable from the quasi-existential analysis of death that, I am now arguing, is implicit in Derrida's substitution of futurality for the inherent dignity of human life as a basis for his critique of capital punishment.

To return to the explicit terms of that critique, Derrida points out that the calculating machinery of the death penalty would destroy that future along with its alterity. "Where the anticipation of my death becomes the anticipation of a calculable instant, there is no longer any future, there is thus no longer any event to come, nothing to come, no longer any other."[33] The specific evil of the death penalty is therefore not the taking of life per se but the taking of the future in a "calculated decision": "What we rebel against when we rebel against the death penalty is not death, or even the fact of killing, of taking a life; it is against the calculating decision, not so

much the 'you will die,' . . . [but that] you will die on such and such a day, at such and such an hour, in that calculable place, and from blows delivered by several machines, the worst of which is perhaps neither the guillotine nor the syringe, but the clock and the anonymity of clockwork."[34] It is thus the calculation inherent in the sovereign command, not death as such, that robs life of its "not yet."[35]

Except that death cannot be a "calculable decision" and therefore, in principle, life cannot be robbed of its "not yet." As Derrida puts it in another context, "*il faut l'avenir*"—"it is necessary [that there be] a future."[36] That is why he says that our fascination with the death penalty—"this calculation, this mastery, this decidability" over death—is fascination with a "phantasm."[37] If death (in the quasi-existential interpretation that I am here attributing to Derrida) signifies the absolute, unknowable, incalculable future, then no one can guarantee to another "you will die on such and such a day, at such and such an hour."

For Heidegger, dying is the borderline between Dasein's possibility as possibility (as being-there) and its possibility as impossibility (as not-being-there), and it is only in resolutely confronting that borderline that Dasein appears to itself as such. As Derrida demonstrates in *Aporias*, however, nothing can appear at that borderline, because death—death *as such*, death as not-being-there—is precisely what cannot appear to Dasein, because Dasein's world only appears by virtue of its being-there.[38] Paradoxically, just insofar as it is finite, finite being has no determinable borders—that is, borders that appear within its (finite) horizon. What cannot appear cannot be confronted, however, and there is accordingly no absolute terminus of Dasein's finitude as such—no "instant of my death"—that it can assume as its authentic, own-most possibility. *Pace* Heidegger, there is no first-person relationship with death.[39]

That is the reason that what I am calling Derrida's quasi-existential interpretation of death is not an existential one and why (to put the same point another way) there is no phenomenology of death but only an aphenomenology. We die: There is dying in the lay biological sense (the form of a cold, lifeless body); there is dying in the medical sense (which is different than the lay sense and which takes contestable forms); there is dying in the legal sense (its definition is also contested and differs for different purposes); and there are dyings that assume their meanings in innumerable other cultural, religious, and social contexts. And there is the death penalty, which declares the moment of dying and therefore of death, *avant la lettre*. These forms of dying happen; they take place; they exist. In Heideggerian terminology, they are existentiell events, however, not existential

ones. They are *in* Dasein's world; they do not *open* that world and they do not determine Dasein itself as such.

Thus—to press harder yet on this analysis—apart from its time and place, one cannot even say to another "you are dying" in the confident knowledge of what that means, at least without specifying the particular and contingent idiom (medical, legal, religious, other) in which one is speaking. We do not know (and cannot calculate in Derrida's sense) dying as such—dying as the absolute terminus that bounds, and thus defines, a finite life and its death.[40] There is no privileged, existential interpretation of death that these other contestable interpretations presuppose, and thus there is no dying—no crossing of the border—that is most Dasein's own and that demarcates Dasein as such from the animal (or from other ontical beings, for that matter).[41] By that same token, there is no interpretation that would allow, in principle, for the calculated sacrifice of a human animal's animal life for the sake of her spiritualized humanity.

Maurice Blanchot condenses this quasi-existential analysis in the expression "death as the impossibility of dying."[42] If the impossibility of one's death as such, death as the absolute other of Dasein's finite life, makes the possibility of a calculable borderline between life and death—and human and animal—impossible, then "dying" in the sense of a singular and finally determinable passage across that border is also impossible, and the legal declaration "you will die on such and such a day, at such and such an hour" cannot possess the calculated certainty to which it pretends. Nor can the legal calculation according to which the taking of a life upholds the value and dignity of the social-political order be credited with the moral certainty that it claims. Those calculations are in every case, in principle, "phantasmatic." And not only in principle. In the United States at least, where condemned prisoners are three times as likely to be released from death row or die from natural causes as they are to be executed, nothing is more fantastic than the notion that a sentence of death determines the time, place, and moral-legal justification for a prisoner's death.[43] The institution of capital punishment, however real its effects and the suffering it imposes, is also—necessarily—nothing more than its own phantasm.

I am tempted to call this hypothesis "hauntological abolition" or "spectral abolition" ("hauntology" being the name of another of Derrida's deconstructions of Heideggerian ontology) and to suggest that it may be as close to achieving the "impossible task" of breaking the abolitionist/antiabolitionist alliance as we are likely to get.[44] Specters, ghosts, and phantasms are privileged figures in Derrida's work in part because they turn the line between death and life from a certainty into a question and figure, simul-

taneously, an unsettled past, an uncertain present (does their spectral appearance signify presence or absence?), and the indefinite possibility of future returns. As such, they symbolize l'avenir itself (what Derrida calls elsewhere "historicity as future-to-come").[45]

The consequences of this analysis reach beyond the institution of capital punishment. If "the possibility of the death penalty . . . belongs to the structure of the law," then its phantasm must haunt the presumed calculability of law in general as well—a ghost in the legal machine subverting its received concept of rationality along with its killing mechanism.[46] (Derrida himself calls it a "self-exploding bomb. . . , an implosive power of deconstruction at the center of law's rationality.")[47] The existence of such a phantasmatic calculability or spectral abolition could never be more than a hypothesis, since, like death itself, ghosts do not appear as such. What does not appear can still have effects, however, and sometimes leaves traces. In the next section, I look for such traces in the United States law of capital punishment.

Furman *and* Woodson

In *Callins v. Collins*, decided (or rather not decided) in 1994, Supreme Court Justice Harry Blackmun announced that, after many years of struggle with the issue, he had finally concluded that the death penalty was unconstitutional.[48] His opinion opens with the following words: "On February 23, 1994, at approximately 1:00 A.M., Bruce Edwin Callins will be executed by the State of Texas. Intravenous tubes attached to his arms will carry the instrument of death, a toxic fluid designed specifically for the purpose of killing human beings. The witnesses, standing a few feet away, will behold Callins, no longer a defendant, an appellant, or a petitioner, but a man, strapped to a gurney, and seconds away from extinction."[49]

Despite having decided nothing, *Callins* is among the better-known cases in recent Supreme Court history. Its fame is based entirely on Justice Blackmun's eloquent, agonized prose and the clarity with which he dissects the court's, and his own, failure to establish a legal regime capable of ensuring the fairness of death sentences. His concession of defeat has become an abolitionist mantra: "From this day forward, I no longer shall tinker with the machinery of death."[50]

I trust the Derridean thematics of this passage are clear. Blackmun says, in effect, that Callins "will die on such and such a day, at such and such an hour," and the citation of the precise date and time of execution is an integral part of this scene of cruelty—the cruelty of the clock, as Derrida puts

it. The expression "machinery of death" needs no comment in light of Derrida's repeated references to the "machine of the death penalty."[51] More important, the scene cuts through the ideology of the death penalty, the "classic philosopheme of all the great right-wing philosophies that have favored the death penalty."[52] We are witnesses to this scene, not observers—the witnesses are our surrogates, and the responsibility that witnessing imposes on them, standing "only a few feet away" from Callins's violent death, is our own responsibility. What we witness is the machinery of death arrayed against Callins's bare human life, stripped of all of the categories that make him recognizable and culpable before the law ("a defendant, an appellant, a petitioner"). There is no sacrifice in this scene, no suggestion that taking Callins's life will redeem his own humanity or that of the social order—he is strapped to the gurney like an animal. Callins's bare life mutely denies the spiritualized transcendence that the philosophical tradition has identified as the hallmark of the death penalty. (One thinks of the Officer's corpse at the end of *In the Penal Colony*, Kafka's allegory of law and capital punishment, whose blank stare gave the lie to the apparatus's "promised redemption.")[53] Even Blackmun's use of "extinction" emphasizes the animal nature of the death that is about to occur.[54]

Derrida does not cite *Callins*, but he does allude on a number of occasions to the Supreme Court cases that Blackmun analyzed. Interestingly, he gets them wrong. At several points he suggests that the 1972 Supreme Court decision that struck down all existing United States death penalty systems—*Furman v. Georgia*[55]—was based on a finding that all of the execution methods then in use were excessively cruel within the meaning of the Eighth Amendment's Cruel and Unusual Punishments clause.[56] Consistent with that interpretation, he suggests that the five 1976 decisions that approved some states' amended capital systems—generally referred to as the *Gregg* cases[57]—reinstated capital punishment because those states had adopted the putatively less cruel method of lethal injection.[58]

Furman, however, did not turn in any way on the asserted cruelty of execution methods—their "unusual cruelty"—but rather on the arbitrariness of the death penalty's application—its "cruel unusualness," as it were. In the words of Justice Potter Stewart, the death penalty was cruel "in the same way that being struck by lightning is cruel and unusual"—that is, cruel in the unjustifiable singling out of a very random few for death while sparing the great majority of those who committed the same crime under often identical circumstances.[59]

To rectify that constitutional infirmity, the court required death penalty statutes to provide a legal mechanism that would assure consistent verdicts in similar cases. Specifically, if they wanted to impose capital punishment, states had to identify in their capital legislation particular factors—for example, that there were multiple victims or a vulnerable victim—that distinguished murders deserving of the ultimate sentence from those in which life imprisonment was a sufficient punishment. These have become known as "aggravating factors," the factors that weigh on the side of death. There is virtually no limit to the number or content of aggravating factors a state may enact; the only requirement is that they be sufficiently defined to guide a jury's discretion in determining the sentence. In this way, the problem of arbitrariness—of not treating like cases alike—was to be solved by written legal standards that would provide consistency.

Derrida can be forgiven for assuming that *Furman* was based on the death penalty's cruelty, given the most natural reading of "cruel and unusual punishment." And he can certainly be forgiven for not making it all the way through the nine separate and lengthy opinions—one from each justice—that make up the *Furman* decision. But he can be forgiven even more for misunderstanding the meaning of the 1976 *Gregg* cases, because, in effect, their holding is that arbitrariness is also a *requirement* of a constitutional death penalty system.

The issue arose in *Woodson v. North Carolina*, one of the 1976 cases.[60] In response to *Furman*, the state of North Carolina passed a law that imposed the death penalty for all murders. On its face, this should have been the least arbitrary of all capital laws—if the crime was murder, the penalty was death, with no options for the jury or judge to distinguish among them. Nevertheless, the Supreme Court held that mandatory capital punishment schemes were unconstitutional. The problem, the court explained, was that the Constitution also required, in addition to nonarbitrariness in the sense of equal treatment, that a death penalty system be "nonarbitrary" by allowing consideration of the uniqueness of every murder and, more important, the unique moral desert of each individual murderer. Accordingly, after *Woodson*, before sentencing a defendant to death, a capital jury must have the opportunity to evaluate whether that person—the person in full, the person who is both the sum and more than the sum of all of her unique life experiences—deserves life, even taking into account the horror of the crime. In other words, a decision to impose the death penalty must be nonarbitrary—it must conform to the basic principle of legality, treating like cases alike—and it must *not* treat any two cases alike, because the jury

must consider the unique qualities of each unique individual before making its decision.

It would be pointless to indict Derrida for misunderstanding this highly technical and self-contradictory area of doctrine. His misunderstanding did, however, represent a lost opportunity to develop and extend his theses about capital punishment in the direction of his other writings about law. That is because together, *Furman* and *Woodson* create a structure that reproduces, with astonishing fidelity, the aporia of law and justice that Derrida describes in his most important essay on the law generally, "Force of Law: 'The Mystical Foundation of Authority.'"[61]

Thus, on one side (*Furman*), there is the abstract generality of law that authorizes, even requires, the use of violence against those who fall within its scope. This is law as the inexorable rationality of the categorical imperative, the "element of calculation."[62] On the other side (*Woodson*), stands the Levinasian requirement of singularized, incalculable justice that gives the lie to that generality and stands against its violence. The relation between the two requirements is a genuine aporia, moreover, and not mere contradiction: There is no law, however general, without application to the singular case (in fact, singular cases are what make law), just as singular lives remain unrecognizable and powerless without submitting to the general legal categories—"defendant," "appellant," "petitioner," in the *Callins* example—that give their status the force of law. (There is an elaborate jurisprudence of the "mitigating factor" that regulates if, when, and how jurors may consider the defendant's life evidence as well.) This is a structure that wears its aporetic "autoimmunity" (in Derrida's sense) on its face.

Judges and commentators have bemoaned that autoimmunity for years (although that is not what they have called it, of course), but it is best expressed in Justice Blackmun's *Callins* opinion. The "machinery of death" that he rejects is the thicket of legal doctrines that have grown up around the death penalty as the Supreme Court has attempted to reconcile the irreconcilable dictates of *Furman* and *Woodson*, an attempt that has resulted in increasingly technical complexities to increasingly little effect. Finally facing up to this irreconcilability, Blackmun decided, in effect, for singular justice and individual life against abstract law and the negation of death.

It is telling with regard to the aporia underlying this structure that in response to Blackmun, Justice Antonin Scalia wrote his own opinion in *Callins* opposing Blackmun's conclusion while agreeing with him on every point of his analysis. Scalia rejects the Supreme Court's "machinery of death" also, for the same reasons that Blackmun does: It has become unworkable, in fact has always been unworkable, because of the contradic-

tory requirements of law-like rules and individual justice. Unlike Blackmun, however, he sides with law and death, having declared in earlier opinions that he will apply only *Furman* in death penalty cases and will ignore the *Woodson* requirement.[63] For both justices, the Supreme Court's capital jurisprudence, like the execution apparatus in *In the Penal Colony*, destroys itself in its own operation.

Praxis

Is this aporetic autodestruction a sign of a "spectral abolition" at work in the ostensible rationality of law? In "Force of Law," the dimension of l'avenir lies on the side of singular justice. Justice, Derrida says, "remains, is yet, to come, *a venir*, it has an, it is *a-venir*, the very dimension of events irreducibly to come."[64] It is an "overflowing of the unpresentable over the determinable" and as such is "unrepresentable."[65] Yet "incalculable justice *commands* calculation" in the very legal idiom that will never itself be just.[66]

In the life and death struggle of a capital prosecution, l'avenir lies in the hands of the defense team, whose ultimate goal is allowing their client a genuine future, a death not dictated by the state. That struggle is a legal struggle, carried out within the confines of a legal process in which the defense's primary weapon is the legal right granted by *Woodson* and its progeny to present their client to the jury in her unique singularity. By that token, however, the presentation remains at all times a *legal* presentation, given effect in specific "mitigating factors" that must be judicially approved and weighed by the jurors against the aggravating factors favoring death before they make their life/death decision. Justice, unrepresentable except in legal categories that can only betray it, never appears as such. Nor, strictly speaking, does the defendant herself appear in her unique individuality, except as mediated by law.[67]

Abolition also never appears as such in these trials, although—ghostlike—it almost always appears to appear. It is de rigueur in every capital case to challenge the constitutionality of the death penalty statute under which the client is charged and often to challenge the continuing legality of capital punishment per se. Given the reality of a legal environment in which the legitimacy of the death penalty has been repeatedly affirmed, however, these are rarely more than gestures and play only an insignificant part in the defense's actual case to save the client's life. More fundamentally, capital trials do not concern abolition. The abolitionist movement defends no one in particular; "abolition" is as abstract as law itself. A defense lawyer's responsibility, by contrast, is solely to the cause of saving

the life of her individual client. Justice (as l'avenir) for a capital defendant is an affirmation of the client's future, not an end to the death penalty.

And yet it is in and through these trials that abolition as such, if it is possible, will take place or is already taking place. If abolition in the United States has become a conceivable goal, it is because those struggles for individual lives have exposed the systemic evils—wrongful convictions, the lie of "humane" executions, the racialized nature of the punishment, the perversion of police practices, among others—that have given the abolitionist movement its issues and energy. The machinery of death continues to buckle under its pressure, to the point where for the first time since 1976, abolition tout court has been raised in Supreme Court opinions as a serious possibility.[68]

It is impossible to know whether that possibility can or will ever come to fruition, of course. Indeed, as Derrida says, "let us harbor no illusion on this subject: even when it will have been abolished, the death penalty will survive," in principle at least, for as long as our current politico-theological conceptions of law and sovereignty retain their hold on our political imaginary.[69] By that token, abolition, like justice, is not a concept that ultimately answers to law or "legal reasoning," perhaps not to reason at all, at least in the calculative sense. Nevertheless, as Derrida also says of justice, just because abolition is not a "juridical or political concept," it may yet "open[] up to the *avenir* the transformation, the recasting or refounding . . . of law and politics."[70] Even, perhaps especially, within the law, it leaves room for "indestructible hope" (the words are Robert Badinter's, a capital defense lawyer before he was architect of abolition in France)[71] and therefore reason "to organize, work, and militate with a cool head" on its behalf.[72] Because *il faut l'avenir*, the work goes on.[73]

NOTES

The author is General Counsel, Military Commissions Defense Organization, United States Department of Defense. The views expressed are those of the author alone and do not represent the views of the Department of Defense or United States government.

1. Martin Heidegger, *Being and Time*, trans. John Macquarrie and Edward Robinson (New York: Harper & Row, 1962), ¶¶ 46–53, 279–311.

2. Jacques Derrida, *The Death Penalty*, vol. 1, trans. Peggy Kamuf (Chicago: University of Chicago Press, 2013), 99, 237–39. For Derrida's previous comments on Heidegger's analysis, see, e.g., Jacques Derrida, *Heidegger: The Question of Being & History*, trans. Geoffrey Bennington (Chicago: University of Chicago Press, 2016), 190–204; Jacques Derrida, *Aporias*, trans. Thomas

Dutoit (Stanford, Calif.: Stanford University Press, 1993); Jacques Derrida, *The Gift of Death*, 2nd ed., in *The Gift of Death and Literature in Secret*, trans. David Wills (Chicago: University of Chicago Press, 2008).

3. Jacques Derrida, *The Death Penalty*, vol. 2, trans. Elizabeth Rottenberg (Chicago: University of Chicago Press, 2017), 50.

4. Derrida, *Death Penalty*, 1:256.

5. Ibid., 238–39.

6. Emmanuel Levinas, for example, bases his own phenomenology of death on the experience of murder rather than the death penalty (although he also refers to a "judgment of justice" in this context as well): "In the being for death of fear I am not faced with nothingness, but faced with what is *against me*, as though murder, rather than being one of the occasions for dying, were inseparable from the essence of death." Emmanuel Levinas, *Totality and Infinity: An Essay on Exteriority*, trans. Alphonso Lingis (Pittsburgh, Penn.: Duquesne University Press, 1969), 234.

7. Derrida, *Death Penalty*, 1:23.

8. Ibid., 258.

9. Ibid.

10. Ibid.

11. Derrida stresses throughout the essential relationship between this phantasmatic infinitization and the structure of religious belief: "Earlier I was suggesting that this was one of the places of articulation with religion and theology, with the theologico-political: the phantasm of infinitization at the heart of finitude, of an infinitization of survival assured by calculation itself and the cutting decision of the death penalty, a phantasm that is one with God, with, if you prefer, the belief in God, the experience of God, the relation to God, faith or religion." Derrida, *Death Penalty*, 1:262.

12. Ibid., 237–39.

13. Jacques Derrida, *For What Tomorrow . . . : A Dialogue*, interview with Elisabeth Roudinesco (Stanford, Calif.: Stanford University Press, 2004), 147.

14. Derrida, *Death Penalty*, 1:116, 1:127.

15. Ibid., 141–65.

16. Ibid., 116.

17. Ibid., 127.

18. Jean-Jacques Rousseau, *The Social Contract*, in *Social Contract: Essays by Locke, Hume, and Rousseau*, trans. Gerard Hopkins (Oxford: Oxford University Press, 1948), 199.

19. Derrida, *Death Penalty*, 1:127, 1:124n3. Locke defined "political power" as the "*Right* of making Laws with Penalties of Death, and consequently all less Penalties, for the Regulating and Preserving of Property, and of employing the force of the Community, in the Execution of Such Laws,

and in the defence of the Common-wealth from Foreign Injury." John Locke, "An Essay Concerning the True Original, Extent, and End of Civil Government," in *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), 268.

20. Derrida, *For What Tomorrow*, 145.

21. This was a point made clear in the litigation leading to the abolition of the death penalty in South Africa. See, e.g., State v. Makwanyane, Case No. CCT/3/94 (South African Constitutional Court, 1995) ¶¶ 139–140 (holding that the death penalty violated the constitutional "right to life" while recognizing that the right posed no similar absolute bar to the state's war and police powers).

22. Derrida, *Death Penalty*, 1:282.

23. Ibid., 259n25.

24. See, e.g., Martin Heidegger, *Being and Time*, trans. John Macquarrie and Edward Robinson (New York: Harper & Row, 1962), 287.

25. Derrida, *Death Penalty*, 1:257.

26. Ibid., 310. Again, this future is not a projection into the not-yet of linear time but an existential structure of being-there. "Being-toward-death, as anticipation of possibility, is what first *makes* this possibility *possible*, and sets it free as possibility. . . . . Being-towards-death is the anticipation of a potentiality-for-Being of that entity whose kind of Being is anticipation itself." Ibid., 307.

27. Maurice Blanchot and Jacques Derrida, *The Instant of My Death/ Demeure*, trans. Elizabeth Rottenberg (Stanford, Calif.: Stanford University Press, 2000).

28. Derrida, *Death Penalty*, 1:225.

29. Ibid., 257.

30. On the latter point, see Derrida, *Aporias*, 77: "Who will guarantee that the name, the ability to name death (like that of naming the other, and it is the same), does not participate as much in the dissimulation of the 'as such' of death as in its revelation, and that language is not precisely the origin of the nontruth of death, and of the other?"

31. Nor is it a "refutation" in the Hegelian sense of an *Aufhebung* that Derrida discusses at the outset of his 1964 lecture series on Heidegger, in which he distinguishes Heidegger's notion of the "*Destruktion*" of the history of Being from Hegel's method of historical critique. Derrida, *Heidegger*, 1–11. *Destruktion*, according to Derrida, does not (as in an Aufhebung) incorporate and supersede the object of critique but effects a "step beyond . . . [which is] just as much a step back" from it (6). On my reading at least, the relationship of Derrida's deconstructive interpretation to Heidegger's analysis of Dasein's Being-toward-death could be described in similar terms. The difference between Destruktion and Derridean deconstruction, which (it seems

to me) becomes increasingly clear in Derrida's later work, is that while Destruktion is primarily oriented toward a "step back" from the metaphysical tradition to a lost prior moment, Derrida insists on an impossible "step beyond" the tradition toward an inconceivable future.

32. Heidegger, *Being and Time*, 310: "In this state of mind [*Angst*, anxiety], Dasein finds itself *face to face* with the 'nothing' of the possible impossibility of its existence. Anxiety is anxious *about* the the potentiality-for-Being of the entity so destined. . . , and in this way it discloses the uttermost possibility. Anticipation utterly individualizes Dasein, and allows, in this individualization of itself, to become certain of the totality of its potentiality-for-Being."

33. Derrida, *Death Penalty*, 1:256.

34. Ibid.

35. Derrida's debt to Maurice Blanchot's thinking about death is particularly evident in Blanchot's interpretation of the biblical commandment "thou shall not kill," which remarkably anticipates Derrida's analysis of the specific evil of state killing as usurping decision over the other's undecidable future. "'Thou shalt not kill' obviously means: 'do not kill he who will die in any case' and means: 'because of that, do not infringe on the dying, do not decide the indecisive, do not say: this is done, claiming for yourself a right over this 'not yet.'" Maurice Blanchot, *The Step/Not Beyond*, trans. Lycette Nelson (Albany: SUNY Press, 1992), 108.

36. Jacques Derrida, *Spectres of Marx: The State of the Debt, the Work of Mourning, and the New International*, trans. Peggy Kamuf (New York: Routledge, 1994), 73.

37. Derrida, *Death Penalty*, 1:258.

38. Derrida, *Aporias*, 74–77.

39. In fact, death is proper neither to me nor to you (the addressee, who is posited as living insofar as "you" are an addressee); it is an affair of the third party. Derrida makes this point in the seminar in, among other places, his reading of Guillaume Guillotin's description of the operation of his device. "It is truly the instant of death, but not the instant of my death, always the instant of the death of a third party, of the other who is not and will never be either me, or you, or us: 'the man is no longer.'" Derrida, *Death Penalty*, 1:222.

40. Derrida, *Death Penalty*, 1:239–40.

41. Derrida, *Aporias*, 75–76.

42. Maurice Blanchot, "Literature and the Right to Death," in *The Work of Fire*, trans. Lydia Davis (Stanford, Calif.: Stanford University Press, 1995), 337.

43. As for time and place of death, between 1973 and 2013, 8,466 individuals were sentenced to death in the United States. Of these, 3,194 had

their death sentences overturned on appeal (which is to say that in those cases, the legal machinery of death broke down or otherwise failed to function); 509 died from suicide or natural causes; 425 had their sentences commuted or were removed from death row for other causes. As of December 31, 2013, 2,979 remained on death row. A total of 1,359 individuals—that is, only 16 percent—have been executed. The average length of time on death row among those remaining at the end of 2013 was 14.6 years. United States Department of Justice, Bureau of Justice Statistics, "Capital Punishment, 2013: Statistical Tables," (December 19, 2014), Tables 17 and 15, www.bjs.gov/content/pub/pdf/cp13st.pdf.

As for "moral-political justification," the very high probability that at least some of those executed have been factually innocent defeats the notion that the legal machinery of death can calculate with certainty the moral rationale for executing an individual. This leaves aside the irrationality of imposing death on some factually guilty individuals but not others who have committed virtually identical crimes.

44. Derrida defines *hauntology*, inter alia, as a "logic of haunting" that is "larger and more powerful than an ontology or a thinking of Being." Derrida, *Spectres of Marx*, 10. He refers to it in the specific context of state killing (the "Final Solution") as "the quasi-logic of the ghost" in "Force of Law." Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority,'" in Gil Anidjar, *Acts of Religion* (London: Routledge, 2010), 259.

45. Derrida, *Spectres of Marx*, 73.

46. Derrida, *Death Penalty*, 1:127.

47. Derrida, *Death Penalty*, 2:69.

48. *Callins* was a denial of certiorari, that is, a decision not to decide. Blackmun's opinion was a dissent saying that the court should have heard and decided the case. Of course, it was in fact a momentous decision—the decision not to halt Callins's execution. It is a basic principle of United States law that denials of certiorari are not considered "decisions" and therefore have no precedential effect. The fact that Callins was scheduled to be executed on the day after the court issued its (non)decision to let the execution go forward shows the hollowness of that principle.

49. 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting).

50. 510 U.S. at 1145.

51. See, for example, Derrida, *Death Penalty*, 1:66, 1:257.

52. Ibid., 116.

53. Franz Kafka, "In the Penal Colony," in *The Complete Stories*, trans. Willa and Edwin Muir (New York: Schocken, 1971), 160.

54. In fact, Callins was not executed on February 23 but three years later, in May 1997. His letter to Blackmun, thanking him for his dissent, is in the National Archives (the first page is available online). See Bruce Callins

to Harry A. Blackmun, 1994, holograph letter, Manuscript Division, Library of Congress, gift of Harry Blackmun, 1997, http://www.loc.gov/exhibits/treasures/tr22a.html#obj24.

55. Furman v. Georgia, 408 U.S. 238 (1972).

56. Derrida, *Death Penalty*, 1:53, 1:57, 1:72.

57. Gregg v. Georgia, 428 U.S. 153 (1976).

58. Derrida, *Death Penalty*, 1:79.

59. *Furman*, 408 U.S. at 309 (Stewart, J., concurring).

60. Woodson v. North Carolina, 428 U.S. 280 (1976).

61. Derrida, "Force of Law," 228.

62. Ibid., 244.

63. *Callins*, 510 U.S. at 1142 (discussing his views in Walton v. Arizona, 497 U.S. 639, 672–73 [1990] [Scalia, J., concurring]).

64. Derrida, "Force of Law," 256.

65. Ibid., 257.

66. Ibid.

67. Here, however, a trace recognition of the unmediated personhood at stake in a capital trial can be glimpsed in the mediations of law. The Supreme Court has long suggested that while the trial of a noncapital criminal defendant may proceed in her absence if she flees after the trial starts, a capital defendant's trial may not. Diaz v. United States, 223 U.S. 442, 455 (1912); see also Federal Rule of Criminal Procedure 43(c)(1)(A) (trial may proceed "in a noncapital case, when the defendant is voluntarily absent during sentencing"). Physical presence before the jury and judge is the closest a defendant comes to appearing as such in a criminal trial (although even her physical presence there is staged according to the legal rules and decorum of a courtroom). It is thus telling that the right to presence is stronger in capital cases.

68. See Glossip v. Gross, U.S. 135 S.Ct. 2726, 2755 (2015) (Breyer, J., concurring).

69. Derrida, *Death Penalty*, 1:282–83.

70. Derrida, "Force of Law," 257.

71. Robert Badinter, *L'Exécution* (Paris: Grasset, 1973), 36; qtd. in Derrida, *Death Penalty*, 1:59.

72. Derrida, *Death Penalty*, 1:283.

73. I discuss the significance of the expression "*il faut l'avenir*" for Derrida's thought more generally in Adam Thurschwell, "Specters and Scholars: Derrida and the Tragedy of Political Thought," in P. Goodrich, F. Hoffman, M. Rosenfeld, and C. Vismann, *Derrida and Legal Philosophy* (New York: Macmillan Palgrave, 2008), 159.

CHAPTER 12

The Heart of the Other?

Sarah Tyson

In the introduction to *The Prison and the Gallows*, Marie Gottschalk notes: "Political openings do occur, and then the political future is less constrained by the institutional past and present. These moments are usually few and far between, but they can have profound political consequences. And all the political ferment and mobilization in anticipation of that opening help determine whether major public policy reforms succeed or not."[1]

If, as Derrida urges us, at the end of the first volume of *The Death Penalty*, we harbor no illusion that "even when it will have been abolished, the death penalty will survive; it will have other lives in front of it, and other lives to sink its teeth into," then it becomes much more difficult to determine the meaning of successful reform.[2] If we come to think that the death penalty will survive, then its abolition looks even more complicated than before.

This point is particularly pressing for those seeking the abolition of the death penalty in the United States, where life without parole (LWOP) has become the most politically viable alternative to the death penalty. If we are wary of the death penalty's survival, even certain that it will survive, then we must look for its survival in the measures taken to abolish it. With

that wariness in mind, the first part of this essay argues, drawing on the work of the poet Spoon Jackson, that life without parole is one means of the death penalty's survival.

The second part places life without parole within the lineage, explored by Derrida, of creating a more humane form of the death penalty. Derrida focuses on the attempts, in the forms of the guillotine and lethal injection, to guarantee a painless death that can properly be called more humane. I extend that discussion to consider the "painless" death of life without parole.

In the final section, I question whether the heart of the other, the wellspring, according to Derrida, of the strength, drive, and interest to fight for the abolition of the death penalty is sufficient for the struggle against the death penalty under conditions of white supremacy. Derrida notes that to understand the death penalty in the United States, one must understand its history of racism.[3] That is undoubtedly true. But if "the social lives of some are made possible through the social death of others," then we need more than a reminder of the historically structuring role of white supremacy in the United States to think about militating against the death penalty.[4] For it is possible to militate against the death penalty without addressing social death, but that is not an abolitionism worthy of the name.

Abolishing the Death Penalty?

Derrida writes: "Well, one cannot help but think that the death penalty, inasmuch as it puts an end, irreversibly, along with the life of the accused, to any prospect of revision, reparation, redemption, even repentance, at least on earth and for someone living, the death penalty signifies that the crime it sanctions [*sanctionné*] remains forever, on men's earth and in men's society, un-forgivable."[5]

The death penalty sanctions an act—and we must wonder about both the punishment and the permission implied by the word *sanction*—it sanctions that act and inextricably with the claim that the death penalty itself is neither murder nor crime. Rather, the death penalty is what allows the crime to stand, forever unforgiven, even as it punishes that crime.

The imprisoned writer Spoon Jackson insists, despite his direct experience that this is not the case, that "there must be a way for society to forgive its criminals."[6] Derrida reads the death penalty as a refusal, by the state, of exactly this: "It all happens as if these powers decreed that the imputed crime must remain forever unforgiven: the death penalty signifies

in this regard the inexpiable or the unpardonable, the irreversibly unpardoned. Pardon, the power to pardon is returned to God. 'Pardon, Lord.'"[7] We can see the theological side of the death penalty. The possibility and the power of forgiveness are excluded from the realm of the human.

Peggy Kamuf renders the political side of the theologico-political clearly: "When the state exercises its sovereign right to execute a death sentence, it pronounces some crime and some criminal unforgivable. To forgive them, the state decides, is impossible. Capital punishment is thus the site of the state's and the law's decision as to what is possible/impossible."[8] The sanctioning makes a distinction, and it does so through calculating an end, but not an end to the sanctioned crime. The crime rather endures as that which is impossible to forgive on this earth. The death of the criminal marks the endurance of the crime for this state.

But that is not all the death of the criminal marks. The death penalty is the enactment of sovereignty. Indeed, Derrida argues that the state is never more visible to itself as sovereign than when it stages for itself an execution.[9] Thus, it seems something hopeful, good even, is happening when states replace the death penalty with life without parole. Indeed, in abolishing executions, the state appears to be doing something unintelligible, as Geoffrey Adelsberg observes, which is calling for "the end of the theologico-political state as such."[10] That is, it appears to be abstaining from decisions over life and death. Yet, Derrida is clear, just because the state is most visible to itself at the scene of execution does not mean that something so good, so hopeful, is happening if the state demurs from further executions. To see this, let us consider someone condemned not to death but to life.

To do this, let us read Derrida's questions in the Ninth Session with Jackson in mind. Jackson is not condemned to execution but to life in prison: "When does one die? How to die? Given that I have to die, how do I know, how do I determine what will happen to me under that name, under that intransitive verb, 'to die,' a verb that is more intransitive than any other even as it is always understood as the passage of a transition, a transiting, a perishing, and whose subject, the I, as such, is neither the agent nor the patient, even if it thinks it is committing suicide?"[11]

Further, Derrida maintains: "Fundamentally, it is by answering the question, when? that one can divide, as with a knife blade, two deaths or two condemnations, the condemnation to die and the condemnation to death."[12] Jackson is like all of us who are not on death row in that he is not condemned to die. Yet, this mutated condemnation is the sanction that maintains the crime as unforgivable in the eyes of the state.

As Andrew Dilts argues: "What LWOP *as abolition* represents is not the end of the death penalty, but a recent (and politically seductive) form, expressed as an economic replacement that stands not outside or against the power of the state to take life, but entirely within and subsumed by it. In this case, part and parcel with the death in prison, comes the prohibition on suicide implicit (and strictly enforced) as part of the of the LWOP sentence. Inseparable from the harsh treatment of extended confinement itself in LWOP, *life itself* has become a part of punishment."[13]

Under life without parole, one must not die until one dies naturally. One is condemned to live until one dies. Jackson asks: "Will death be enough? I have died a thousand deaths. Death sometimes seems way more real and promising than living an LWOP sentence."[14] Under what calculation can we answer Jackson's question? Are Jackson's thousand deaths enough? How could we know? The knife blade has been removed. The state is enacting a different, less visible form of sovereignty.

While Derrida is attuned to the possibility of life in prison and even to life in prison as possibly more cruel than the death penalty, particularly when discussing Cesare Beccaria, he has a more central interest in interrogating the scene of execution.[15] He directs us, quite early in the seminar, that "whatever we may think or say during this seminar, we have to think, we still have to think ceaselessly, take ourselves there by way of the heart and the imagination, by the body as well, of the early morning of what is called an execution. At the dawn of the last day."[16] In order to understand the death penalty, Derrida analyzes the figure of the guillotine, as well as the phantastical promise of a painless, anesthetized death through the process of lethal injection.

Derrida acknowledges the role that time plays in cruelty: "One cannot think cruelty without time."[17] Even as he considers execution, notice the role of waiting for death: "One must do everything one can to come as close as possible, in one's body, to those for whom the death penalty is the death penalty, effectively, in an effective way, concretely, undeniably, and cruelly threatening, in the absolute imminence of execution, and sometimes in the suspension of an imminence that can appear infinitely brief or last interminably (in the United States, this can go on, as in the case of Mumia Abu-Jamal, for up to eighteen years at least, eighteen years day after day and night after night)."[18]

I suggest that we resist seeing Jackson's waiting to die as progress over the way Abu-Jamal was once waiting to die.[19] And further, that resistance is in line with Derrida's injunction that we should harbor no illusion about the meaning of the death penalty's abolition.

Olivia Custer argues about Derrida's warning to harbor no illusion: "This claim is Derrida's warning against misreading."[20] For "the prognosis of inevitable progress toward abolition (which the good signs confirm) is doubled by the claim that the death penalty will survive."[21] In other words, no good sign is simply a good sign. We must interrogate what appears to be the abolition of the death penalty as also its means of survival. Life without parole eliminates the scene of execution without abolishing death in prison. Life without parole allows "condemned to die" to stand in for "condemned to death" under the name of life.

Humanity

On the grounds of the knife's removal, life without parole, of course, is meant to be more humane. Life without parole avoids what Michael Naas calls the scandal of the death penalty: "The scandal of the death penalty consists in this calculation *by the other* of the instant of my death, a mechanical calculation of the instant that leaves no room for the incalculable future or for the event—even if, though this is another story, such calculation is always a kind of phantasm of control or mastery over the event."[22] Life without parole leaves one room, not much, and increasingly less, but room nonetheless in the absence of the mechanical calculation of the instant.[23] Unless, we note in line with Derrida's thinking about the relationship between the death penalty and life insurance, that the calculation is actuarial (so, not an insignificant form of calculation).

Impelled by life without parole, we might reformulate the questions that Derrida asks of a discourse that maintains the humanization, humanism, and humanitarianism of the guillotine: "What is it that is proper to man; what is the history of what is proper to man that allows one to think this? What must be that which is called man so that at a moment of his history he comes to consider the guillotine [read, now: life without parole] as an advance in human progress, an advance in man's appropriation of his essence?"[24] Beyond even the anesthetic death of lethal injection, there is a death that allows one to die without blood, "without cruelty," in the "care" of the state, as it were; there is life without parole. Like all of us who are not condemned to death, Jackson is condemned to die.

We might ask, then, about the conditions under which life without parole is served. First, we must note that the United States is not only exceptional among Western countries in maintaining the death penalty but also exceptional in the intent to punish beyond incarceration. European policy is guided by three principles, summarized by Gottschalk: "that

deprivation of liberty should be the sole instrument of punishment for those sent to prison; that reeducation and resocialization of offenders should be the main aim of treatment; and that prisons must respect the basic rights of individuals and foster a humane, dignified environment."[25] One cannot speak in general about the nature of the care of the state, since in the United States prisons are different from jurisdiction to jurisdiction. Yet, it is well established that deprivation of liberty is only one aspect of punishment in the United States.

Food, for instance, is routinely used as punishment within U.S. prisons. While "the American Correctional Association, which accredits prisons and sets best practices for the industry, discourages using food as a disciplinary measure," many prisons serve nutraloaf as a form of punishment.[26] The bland concoction of ground-up food is served meal after meal, sometimes in a brown paper bag and rarely warm.[27] For those of us who have not had the experience of subsisting on nutraloaf, perhaps we can begin to imagine it by remembering the last time we had overabundant leftovers, then amplify that experience by a total inability to secure other food, a total lack of control over when the food will arrive or in what state, and a total lack of control over the composition of the food in the first place. We should probably also imagine ourselves very cold or very hot and alone for days, weeks, months, years, or decades on end. And if we are in any sort of pain, even life-threatening pain or the throes of death, we cannot expect the people who toss the nutraloaf through a tiny slit in the door to offer any help.

Yet, of course, to enumerate the cruelty of the death penalty is to fall into a logic and rhetoric that has led to the idea, first, that lethal injection was an acceptable form of penalty and, now, that life without parole is. After all, we could address issues of food quality, housing quality, and health care—just as lethal injection supposedly addresses the "issue" of a painful death.[28] Abolition undertaken under the certainty of the death penalty's survival, however, has some resilience in the face of such reforms of the forms of sovereignty, because that abolitionism already knows it cannot effect a simple and definitive abolition of the death penalty.[29] Any change, no matter how positive it appears, is also the means of the death penalty's survival.

After enumerating the states that have replaced the death penalty with life without parole, among other developments in the United States that seem to indicate the waning of the death penalty, Elizabeth Rottenberg warns that eliminating blood in the quest to eliminate the cruelty of the death penalty can become an alibi for developing psychic cruelty instead.[30]

Reading Jackson's work, or the work of countless others who have narrated, and shown the limits of narrating, the experience of life without parole attests to it as a sophisticated form of psychic cruelty (one that does not abandon physical cruelty).[31]

It is thus somewhat surprising when Rottenberg ends her essay by entertaining the possibility that Derrida's seminars on the death penalty could be the swan song of the death penalty, alluding, it seems, to the trend of replacing the death penalty with life without parole. Rottenberg does not make this argument expressly. Indeed, she offers the powerful distinction between a sign of mutation and one of progress and, central to the essay, tracks the importance of cruelty's endurance beyond the spilling of blood. But the essay nonetheless suggests—it gives one hope—that the death penalty could have a swan song and we might already be able to hear its tune in the United States.

Olivia Custer, responding to Rottenberg's essay, frames a series of questions that offer further resistance to the seductive idea that the death penalty can be finally and fully replaced with something that accomplishes its abolition. She asks:

> How is Derrida's struggle against the death penalty modified by his awareness that it will survive its abolition from the earth? What new kind of struggle for abolition can "appropriate" this fact, can be appropriate in view of this prognosis? How can we mobilize our philosophical heritage in a struggle that will not be undone by the survival of the death penalty? How are we to fight against the death penalty while keeping in mind that the "victory" would not turn out to be pyrrhic if the adversary survives? Beyond being "simply a fact," is this survival threatening and discouraging, or desirable?[32]

Custer follows these questions with an example of a humorous campaign to end a cruel practice in the management of piglets in Belgium. What is particularly remarkable and of great pedagogical value to those seeking the abolition of the death penalty is that the campaign successfully ends a cruel practice but does not save a single pig from slaughter. If one is seeking a simple and definitive end to the death penalty, then the campaign to save piglets from a particularly cruel practice looks beside the point, at best, and certainly a failure. If, however, one's abolitionism is informed by the awareness that the death penalty will survive, then the successful campaign to end a cruel practice is neither a sign of progress nor a pyrrhic victory. A mutation has been effected. Now, where should pressure be applied?

The Heart of the Other

In what Peggy Kamuf calls the heart of the seminar, Derrida writes that the alternative to the death penalty is not immortality but indeterminacy. The philosophical form of the paradox of the death penalty, according to Derrida, "is that what is ended by the possibility of the death penalty is not the infinity of life or immortality, but on the contrary, the finitude of 'my life.'"[33] Thus, what the death penalty seems to make possible is an end to such indeterminacy. We seem to face finitude. Life without parole, by contrast, does not end the finitude of "my life." Rather, it depends upon the principle of indetermination to punish, to sanction. The calculation of the death penalty is removed, but the state still decides forgiveness is impossible.

If there is no simple, definitive alternative to the death penalty, then the death penalty's alternative, indeterminacy, could become a means of the death penalty's survival. That is what is happening with the replacement of the death penalty with life without parole—the death penalty survives through capitalizing on indeterminacy. Those who seek the abolition of the death penalty can be guided by this notion of survival. I want to urge that practice and then move on. But I have one more concern to raise in light of something Spoon Jackson writes: "Perhaps it is my age, why write anything when, for colorful reasons, it goes nowhere? Even in my letter-writing, it seems I write and write, yet nobody hears."[34] There are many ways to approach Jackson's question and concern, but I propose a quite straightforward approach: to believe that his writing goes nowhere and that he is not heard.

I make this proposition to resist my favorite lines of the seminar, the ones that leave me with the most hope. These are: "Where else would I find the strength and the drive and the interest to fight [*me battre*] and to struggle [*me débattre*], with my whole heart, with the beating [*battant*] of my heart against the death penalty? I can do it, me, as me, only thanks to the other, by the grace of the other heart that affirms life in me, by the grace of the other who appeals for grace and pardon or appeals the condemnation, and with an appeal to which I must respond, and that is what is called here, even before any correspondence, responsibility."[35]

It is a beautiful thought, if also at times terrible, that the heart most interior to my own is the heart of the other. But I want to entertain for a moment the thought that while it may be true that I can do it, me, as me, only thanks to the other, it is also true that I can do what I can do thanks to the negation of the other—the impossibility of the other as an other to or for me.

There are many articulations of this possibility, but I will raise only two here. First, Saidiya Hartman's claim: "The slave is the object or the ground that makes possible the existence of the bourgeois subject and, by negation or contradistinction, defines liberty, citizenship, and the enclosures of the social body."[36] And Frank Wilderson's claim: "But *African*, or more precisely *Blackness*, refers to an individual who is by definition always already void of relationality. Thus modernity marks the emergence of a new ontology because it is an era in which an entire race appears, people who, a priori, that is prior to the contingency of the 'transgressive act' (such as losing a war or being convicted of a crime), stand as socially dead in relation to the rest of world."[37]

These thinkers, among many others, offer an understanding of how the life of some can be built on the social death of others. If my life is made possible by the negation of the other, then what happens to responsibility? From whence the strength, the drive, and the interest to fight for the abolition of the death penalty? For those living social death, what appeal can be made? Is there responsibility that does not already amount to transgression? Under what conditions can Jackson be heard?

Perhaps we have left the subject of the death penalty. In the Tenth Session, Derrida considers whether genocide can properly be considered the death penalty. He writes:

> For there to be condemnation to death, and not just putting to death, crime, murder . . . it is necessary at least, *in principle*, that there be, *at least*, precisely [*justement*] a system of justice, a code of law, a simulacrum at least, a scene of judgment. A genocide or the putting to death of a collective or anonymous entity (languages, institution, culture, community) does not therefore partake, sensu stricto, literally, of a logic or of the concept of condemnation to death. A question of structure and proportion. There must always be a judgment, a verdict, and the subject of it must be a personal, nameable subject, answerable to his or her name.[38]

If a code of law, or at least a simulacrum of it, is built on the social death of some, then those who bear the weight cannot appear as personal, nameable subjects.

Even when someone appears under a name, their name, that does not necessarily amount to being a nameable subject. As Saidiya Hartman notes of slavery: "Not surprisingly, the agency of the enslaved is only intelligible or recognizable as crime and the designation of personhood burdened with incredible duties and responsibilities that serve to enhance the repressive

mechanisms of power, denote the limits of socially tolerable forms of violence, and intensify and legitimate violence in the guise of protection, justice, and the recognition of slave humanity. This official acknowledgement of agency and humanity, rather than challenging or contradicting the object status and absolute subjugation of the enslaved as chattel, reinscribes it in the terms of personhood."[39]

But, of course, we need not leave Derrida's work to find that the name is not so simple. To cite but one complication: "The proper name was never possible except through its functioning within a classification and therefore within a system of differences."[40]

I raise the possibility that we may have left the subject of the death penalty in the pursuit of harboring no illusions. The deaths of Michael Brown, Eric Garner, and Tamir Rice, to name but a few, show us that there are powerful illusions still at work.[41] Their deaths were not enactments of the death penalty, but neither were their killings, apparently, outside the law. It is strange how easily we can group their names together given their very different lives, their very different encounters with police that led to their deaths, and their very different deaths.

Yet, they recognizably form a group, one that protestors have mourned under the banner "Black Lives Matter."[42] Alicia Garza, Patrisse Cullors, and Opal Tometi created #BlackLivesMatter after the killing of Trayvon Martin as "an ideological and political intervention in a world where Black lives are systematically and intentionally targeted for demise. It is an affirmation of Black folks' contributions to this society, our humanity, and our resilience in the face of deadly oppression."[43] One must protest that Black lives matter only in a situation where that idea is not obvious, reliable, assumed, and quotidian. As Garza's description of the intervention "Black Lives Matter" vividly attests, it is an affirmation in the midst of systematic negation. It is a protest that has been underway a very long time, if under different banners.[44]

Derrida clarifies that the activity of harboring no illusions does not preclude militating against the death penalty and, thus, for what is left of life.[45] Yes, and we must also militate for an end to forms of social life for some that are built on the social death of others. Following the work of Wilderson and Hartman, we can see that it is possible to militate against the death penalty without also militating against social death. And, indeed, many of the most prominent forms of organizing against the death penalty fail to militate against social death. With social death, no life may appear—left to save or for the death penalty to sink its teeth into. Life without parole is not just the death penalty by other means, it is also a means of

intensifying social death. To hear Jackson, I think, requires believing him that, under these conditions, he is not heard. And, further, for us to create the conditions to hear him, we can harbor no illusions about what hearing him demands.

NOTES

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1. Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2006), 17.

2. Jacques Derrida, *The Death Penalty*, vol. 1 (Chicago: University of Chicago Press, 2014), 282–83.

3. Ibid., 74.

4. That particular turn of phrase from Andrew Dilts, in private correspondence. Important articulators include Frantz Fanon, Orlando Patterson, Hortense Spillers, Saidiya Hartman, Frank Wilderson, and Judith Butler.

5. Derrida, *Death Penalty*, 45.

6. Spoon Jackson, "Dead Man Living," in *Too Cruel, Not Unusual Enough*, ed. Kenneth E. Hartman (Lancaster, Calif.: The Other Death Penalty Project, 2013), 117.

7. Derrida, *Death Penalty*, 46.

8. Peggy Kamuf, "At the Heart of the Death Penalty," *Oxford Literary Review* 35, no. 2 (2013): 241.

9. Derrida, *Death Penalty*, 3.

10. Geoffrey Adelsberg, "Inheritances of the Death Penalty: American Racism and Derrida's Theologico-Political Sovereignty," in *Death and Other Penalties: Philosophy in a Time of Mass Incarceration*, eds. Geoffrey Adelsberg, Lisa Guenther, and Scott Zeman (New York: Fordham University Press, 2015), 87.

11. Derrida, *Death Penalty*, 219.

12. Ibid.

13. Andrew Dilts, "Death Penalty 'Abolition' in Neoliberal Times," in *Death and Other Penalties: Philosophy in a Time of Mass Incarceration*, eds. Geoffrey Adelsberg, Lisa Guenther, and Scott Zeman (New York: Fordham University Press, 2015), 120.

14. Jackson, "Dead Man Living," 118.

15. Derrida writes of Beccaria's abolitionism: "And yet, when he proposes to replace the death penalty by life imprisonment, Beccaria seems not to realize that his best argument is the reference to the cruelty of 'perpetual penal

servitude,' concerning which he says calmly that it is more dissuasive than the death penalty because more dreadful than death." (Derrida, *Death Penalty*, 94).

16. Derrida, *Death Penalty*, 3.

17. Ibid., 220.

18. Ibid., 138.

19. Abu-Jamal is now sentenced to life without parole. "Who Is Mumia Abu-Jamal?" Free Mumia, http://www.freemumia.com/who-is-mumia-abu-jamal/.

20. Olivia Custer, "Angling for a Stranglehold on the Death Penalty," *Southern Journal of Philosophy* 50 (2012): 164.

21. Ibid., 165.

22. Michael Naas, "The Philosophy and Literature of the Death Penalty: Two Sides of the Same Sovereign," *Southern Journal of Philosophy* 50 (2012): 54.

23. Overcrowding in California prisons, for instance, was found in 2011 by the Supreme Court to result in cruel and unusual punishment (Brown v. Plata, 563 U.S. 493 [2011]). In 2014, California asked for and received an extension to rectify overcrowding. Howard Mintz, "California Prison Overcrowding Fix Gets Two-Year Extension," *San Jose Mercury News*, February 10, 2014, http://www.mercurynews.com/crime-courts/ci_25104983/california-prison-overcrowding-fix-gets-two-year-extension.

24. Derrida, *Death Penalty*, 192.

25. Gottschalk, *Prison and the Gallows*, 250.

26. Eliza Barclay, "Food as Punishment: Giving U.S. Inmates 'the Loaf' Persists," *the salt* (blog), January 2, 2014, http://www.npr.org/blogs/the-salt/2014/01/02/256605441/punishing-inmates-with-the-loaf-persists-in-the-u-s.

27. Ibid.

28. The Death Penalty Information Center maintains a website that lists examples of botched executions since the reinstatement of the death penalty in the United States; the majority of the cases listed are executions via lethal injection. "Botched Executions," Death Penalty Information Center, December 8, 2016, http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions.

29. Precisely what Victor Hugo calls for and an approach to abolition around which Derrida organizes the seminars.

30. Elizabeth Rottenberg, "Cruelty and Its Vicissitudes: Jacques Derrida and the Future of Psychoanalysis," *Southern Journal of Philosophy* 50 (2012).

31. Spoon Jackson's work can be accessed at http://realnessnetwork.blogspot.com/ as well as in *By Heart: Poetry, Prison, and Two Lives*, with Judith Tannenbaum (New York: New Village Press, 2010). See also a collection of

writing by people (including Jackson) serving life without parole sentences, Kenneth Hartman, ed., *Too Cruel, Not Unusual Enough* (Lancaster, Calif.: The Other Death Penalty Project, 2013).

32. Custer, "Angling for a Stranglehold," 165–66.

33. Derrida, *Death Penalty*, 256.

34. Spoon Jackson, "One Foot in Darkness," in *Philosophy Imprisoned: The Love of Wisdom in the Age of Mass Incarceration*, ed. Sarah Tyson and Joshua Hall (Lanham, Md.: Lexington Books, 2014), 126.

35. Derrida, *Death Penalty*, 257.

36. Saidiya Hartman, *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America* (New York: Oxford University Press, 1997), 62.

37. Frank Wilderson, *Red, White, and Black: Cinema and the Structure of US Antagonisms* (Durham, N.C.: Duke University Press, 2010), 18.

38. Derrida, *Death Penalty*, 253.

39. Hartman, *Scenes of Subjection*, 62.

40. Jacques Derrida, *Of Grammatology*, trans. Gayatri Chakravorty Spivak (Baltimore, Md.: Johns Hopkins University Press, 1997), 109.

41. These are the names that were foremost in mainstream U.S. media when I began writing this project.

42. Judith Butler reads these protests as acts of "open mourning for those whose lives were cut short and without cause, brutally extinguished. The practices of public mourning and political demonstration converge: when lives are considered ungrievable, to grieve them openly is protest." See "What's Wrong With 'All Lives Matter'?," interview with George Yancy, *New York Times*, January 12, 2015, http://opinionator.blogs.nytimes.com/2015/01/12/whats-wrong-with-all-lives-matter/?_r=0.

43. Alicia Garza, "A Herstory of the #BlackLivesMatter Movement," Feminist Wire, October 7, 2014, http://thefeministwire.com/2014/10/blacklivesmatter--2.

44. See, for an invocation of genocide to name the social death of Black people in the United States, Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief from a Crime of the United States Government against the Negro People* (New York: Civil Rights Congress, 1951), xi–xiii, 3–10.

45. Derrida, *Death Penalty*, 283.

CHAPTER 13

An Abolitionism Worthy of the Name

From the Death Penalty to the Prison Industrial Complex

Lisa Guenther

In Derrida's lectures on the death penalty, the United States figures as "both exemplary and exceptional."[1] On one hand, the American practice of lethal injection exemplifies the logic of the death penalty by trying—and often failing—to produce the appearance of a painless, humane, and civilized execution. On the other hand, the United States stands out as an exception to the rule of twentieth-century abolition; it is "the only and the last large country of so-called European culture, and with a so-called democratic constitution, that maintains . . . the principle of the death penalty and its massive, even growing application."[2] Derrida acknowledges a possible connection between the persistence of capital punishment in the United States and the history of slavery, suggesting that the boundary between northern and southern states—the latter of which perform the most executions in the country—is "like a scar or a still open wound . . . close to resembling, give or take a few divergences, that of the Civil War—that is, the war over abolition, this time the abolition of slavery."[3] But he does not reflect at any length on this connection, nor does he mention that the Thirteenth Amendment only partially abolished slavery, making an exception for those who have been "duly convicted" of a crime and creating

a loophole for practices such as convict leasing, which some historians have called "worse than slavery."[4]

Derrida notes that "black Americans are today the primary victims of what remains of the death penalty in the so-called Western world," suggesting with this repeated expression, "so-called," that the United States functions as a counterfeit copy of European values and principles, with an illegitimate claim to the name "Western" or "democratic."[5] As evidence of the racist structure of American state violence, Derrida refers in passing to two examples of black men sentenced to death in the United States: Mumia Abu-Jamal and Thomas Miller-El.[6] At the time of the seminar, Mumia had spent eighteen years on death row for the alleged murder of a Philadelphia police officer; his death sentence was vacated in 2011, after nearly thirty years on death row. Since then, Mumia has remained incarcerated in Pennsylvania, where he has filed several lawsuits for inadequate medical treatment for chronic illness. Miller-El's 1986 conviction was overturned in 2005 on the grounds that the prosecution deliberately excluded African Americans from the jury for his capital trial, but he remains in a Texas prison serving life as the result of a plea deal. In both cases, the men may have evaded state execution, but they remain subject to a death-in-prison sentence and to the social death of extreme isolation.[7] Derrida claims that "one must at least do everything one can do to come as close as possible, in one's body, to those for whom the death penalty is the death penalty."[8] And yet, while he reads at length from a letter and document advocating for Miller-El, noting that "every detail matters," he does not actually engage with these details or integrate them into his analysis of the logic of the death penalty.[9] Nor does he engage with the writing of Abu-Jamal, whose collection *Live from Death Row* was published in 1995, and on whose behalf he wrote a short essay that same year.[10]

Derrida asks his audience to imagine a "map colored in black," citing some empirical data related to the number, distribution, and method of execution in the United States.[11] He claims that these numbers are "necessary and significant in themselves," but surprisingly, he does cite the most significant data on racial bias in the U.S. death penalty system: the Baldus Study, which analyzed over two thousand death penalty cases in the state of Georgia for *McCleskey v. Kemp*, a 1987 Supreme Court case in which another black man, Warren McCleskey, was sentenced to death for allegedly killing a white police officer.[12] Baldus found that defendants charged with killing a white person were 4.3 times more likely to get the death penalty than defendants charged with killing a black person, even after thirty-nine nonracial variables were factored out. While the race of the

victim had the most significant impact on the outcome of capital cases, Baldus also found that black defendants were 1.1 times more likely than white defendants to get the death penalty and that a black defendant with a white victim was the combination most likely to result in a death sentence in the post-*Furman* era. The study has since been repeated in other states, with similar results. However, this evidence of systemic racial injustice in capital cases failed to convince the court that McCleskey in particular had experienced deliberate racial discrimination; he was executed by the state of Georgia in 1991.

Derrida insists on his own "vigilant concern to interpret the legal, juridical, legislative phenomenon of the abolition of the death penalty on the basis of an analysis of the sociopolitical situation and social antagonisms that determine infrastructural conditions of security or insecurity for the property and life of the citizens who hold power."[13] And yet, he does not actually do this work in *The Death Penalty*. Rather, his analysis sidesteps a rigorous analysis of race and of the relationship between race, property, and life, positing the United States as the site of examples, exceptions, and data to be mined without further commentary or analysis, in contrast with Europe as the source of concepts, arguments, principles, and texts worthy of careful commentary. Throughout the first volume of his death penalty lectures, Derrida's main interlocutors are European intellectuals—Beccaria, Kant, Hugo, Camus, and others—whose account of the issues at stake in the death penalty and its abolition do not necessarily translate into a U.S. context where the political structure of sovereignty is quite different and where the history of slavery and racial capitalism continues to shape the practice of state execution.

My point is not merely to criticize Derrida for these oversights and inconsistencies but rather to explore the possibility of bringing his reflections on the logic of the death penalty—in particular, his analysis of the relation between interest, indemnity, and property—into conversation with critical race theorists and prison abolitionists whose primary focus is to map, analyze, and dismantle racist power structures in the United States. Given the interconnected histories of Europe and the Americas through the Transatlantic slave trade, and the global problem of racist state violence, there is much for scholars in Europe and elsewhere to learn about their own historical "wounds" and "scars" from a close engagement with critical race theory. An abolitionism worthy of the name would have to desist from an exclusive focus on European intellectual traditions and to engage with the histories and practices of broader abolition movements, including movements to abolish slavery, lynching, racial segregation, and

the prison industrial complex. These movements have not been led primarily by disinterested white intellectuals intervening on behalf of unfortunate "victims"; rather, they are led by people like Frederick Douglass, Ida B. Wells, Martin Luther King, Rosa Parks, Angela Davis, and George Jackson, as well as organizations such as Critical Resistance and the Sylvia Rivera Law Project—all of whom have a direct and openly avowed interest in abolishing the systems that affect their lives and communities. How might our analysis of the death penalty and the promise of abolition shift if we decentered the perspective of white Europeans and engaged with the work of African American abolitionists not just as examples of victimization but as thinkers, writers, and political actors?

Race, Property, and the U.S. Death Penalty

> At the heart of this country's death penalty scheme
> is the crucible of race.
>
> MUMIA ABU-JAMAL, *Live from Death Row*

> The origins of property rights in the United States
> are rooted in racial domination.
>
> CHERYL HARRIS, "Whiteness as Property"

> How can we imagine a society in which race and class
> are not primary determinants of punishment?
>
> ANGELA DAVIS, *Are Prisons Obsolete?*

In his 1995 essay, "For Mumia Abu-Jamal," Derrida denounces Mumia's death sentence as a "barbarous" injustice.[14] Writing in classic abolitionist style, but already anticipating some of the concepts that arise in his 1999–2000 seminar on the death penalty, Derrida reflects: "[Mumia's] fate remains unique—let us not forget that—as would his death, as will have been an indescribable suffering. And yet this injustice reveals an exemplarity, in its massive generality, a certain state of rights and of penal or prison politics of which so many prisoners are victim in the United States, African Americans in the great majority of cases."[15]

Derrida leaves the last word of his short essay to Mumia himself: "That I write at all reveals the utter failure of their intimidation tactics—as does the fact that you read."[16] Let us read Mumia's writing, then, both as an

abolitionist practice of staying close to "those for whom the death penalty is the death penalty" and as a scholarly practice of researching the racist structure of capital punishment in the United States.

In a dispatch entitled, "On Death Row: Fade to Black," Mumia situates the outcome of *McCleskey v. Kemp* in relation to the *longue durée* of black civil death, both as a legal doctrine and as a material practice of isolating and devaluing black life:

> From daybreak to dusk, black voices resound in exchanges of daily dramas that mark time in the dead zone; the latest on a lawyer; the latest on a lover; tidbits of thought bouncing off bars of steel and walls of stone, relentlessly, in the wait for death.
>
> Echoes of *Dred Scott* ring in today's *McCleskey* opinion, again noting the paucity of black rights in the land of the free, who "had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect."[17]
>
> Chief Justice Taney sits again, reincarnate, on the Rehnquist Court of the Modern Age. . . . Rehnquist's Court, in *McCleskey*, leaves intact the power of the state to further cheapen black life.
>
> One hundred and thirty-three years after *Scott*, and still unequal in life, as in death.[18]

While black men "mark time in the dead zone" of prison, the spirit of white supremacy is resurrected in the Supreme Court as a spectral power invested with the right, and even the moral obligation, to transform contingent power relations into legal principles and theologico-political truths. The United States could only be a democracy affirming that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights" and at the same time a slaveholding state if blacks were not "men" and had "no rights which the white man was bound to respect."[19]

When chief justice Roger B. Taney argued in 1857 that blacks were "not intended to be included under the word 'citizens' in the Constitution," he was not expressing a personal opinion or even an unconscious racial prejudice; rather, he understood that the logical consistency of American democracy and the moral integrity of the founding fathers was at stake in *Dred Scott*.[20] If blacks were "men" or "citizens," then "the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted. . . . Yet the men who framed this declaration were great men—high in literary acquirements,

high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting."[21]

Therefore, blacks were not, could not, and should not be considered citizens. More than a century later, justice Lewis Powell acknowledged in *McCleskey v. Kemp* that the empirical evidence of systemic racial injustice in the U.S. death penalty system "throws into serious question the principles that underlie our entire criminal justice system," and yet—precisely for this reason—he excluded a serious consideration of this evidence from his majority opinion.[22] In so doing, he resurrected the spectral power of white supremacy and (re)inscribed it into law at the expense of black life.

The material support for this spectral power is twofold: both the institutions and practices that confine black bodies to the "dead zones" of slavery, segregation, and mass incarceration, and also the privileges and incentives that recruit white bodies to police, enforce, and profit from black civil death. This is the logic of sovereignty in the so-called democracy of the United States; the power to kill or let live is not centralized in the body of the king, or even in "the king's two bodies," but rather dispersed throughout the white body politic, such that any white man, no matter how poor or otherwise disempowered, is positioned as sovereign in relation to the black man whose "rights" he is enjoined by law to disregard. If we want to understand the exceptional persistence of state execution in the United States, beyond the norms established in Europe and almost all of its settler colonies, then we must reflect "in the first light of dawn" on the logic of white supremacy, which consigns racialized subjects to the dead zones of colonization, slavery, criminalization, and punishment "from daybreak to dusk."[23]

Mumia names the dead zone of the prison industrial complex as a site of "human waste camps" where human beings are transformed into "nonpersons, numbered beings cribbed into boxes of unlife."[24] He connects this spatialization of civil death to the parasitic structure of global capitalism: "A specter haunts America's black communities. Vampirish, it sucks the souls out of black lives, leaving skeletal husks behind, mobile, animated, but emotionally and spiritually dead."[25] For Mumia, this is "a direct result of global greed, governmental deception, and the eternal longing of the poor to escape, however briefly, from the crippling shackles of utter poverty."[26] Rather than performing the strictly penal function of punishing and/or rehabilitating prisoners, the prison industrial complex serves the social function of warehousing surplus populations rendered disposable by poverty, disability, gender nonconformity, and other forms of vulnerability in a postindustrial economy. In a 2014 interview with Marc Lamont Hill,

Mumia analyzes the logic of racial capitalism in terms of the commodification of blackness—whether through the selective valuation of black music and culture or the radical devaluation of black lives in the prison industrial complex—and the reification of whiteness as property: "Whiteness has always been seen as a kind of property. Everybody wants to have it because it entitles you to everything the country has to offer."[27]

The concept of whiteness as property was developed by Cheryl Harris in a groundbreaking 1993 article in the *Harvard Law Review*.[28] Harris argues that "whiteness and property share a common premise—a conceptual nucleus—of a right to exclude."[29] In colonial America, where the concept of whiteness as property first emerged, its purpose was to divide poor migrants from European countries against African captives by marking the latter with a permanent, indelible stamp of slavery, while leaving open a pathway from indentured servitude to freedom (or, at least, to less restricted forms of wage labor) for those considered "white." This division of an economic class along racial lines served the interests of the white planter class, who maintained access to both unpaid black slave labor and cheap white labor, while undermining solidarity between these groups and maintaining its own social, political, and legal supremacy. While relatively few white people benefited materially from this arrangement, the social wages of whiteness were "available to all whites regardless of class position, even to those whites who are without power, money, or influence. Whiteness, the characteristic that distinguishes them from Blacks, serves as compensation even to those who lack material wealth. It is the relative political advantages extended to whites, rather than actual economic gains, that are crucial to white workers. Thus, as Kimberlé Crenshaw points out, whites have an actual stake in racism."[30]

In effect, whiteness became "a shield from slavery" that protected those who were legible as white from being owned as property, even if it did nothing to secure their material sufficiency or wealth.[31] By contrast, slavery "made human beings market-alienable and in so doing, subjected human life and personhood—that which is most valuable—to the ultimate devaluation."[32] This devaluation of blackness and hypervaluation of whiteness as property arguably structures the meaning of citizenship and personhood in the United States, from *Dred Scott* to *McCleskey* and beyond. Even the norm of patrilineal descent was restructured by law to serve the economic and social interests of slaveholders; in 1662, the Virginia colonial assembly decided that "children got by an Englishman upon a Negro woman shall be bond or free according to the condition of the mother," thus incentivizing the rape of black women by white men for their own pleasure and profit.[33]

The concept of whiteness as property acquired a distinct but related significance after the partial abolition of slavery in the Thirteenth Amendment. Now, the taint of civil death shifted from the black body as such to the convicted felon, whom Judge Christian excluded from the rights of full citizens in *Ruffin v. Commonwealth* (1871): "The bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead. Such men have some rights it is true, such as the law in its benignity accords to them, but not rights of freemen. They are the slaves of the State undergoing punishment for heinous crimes against the laws of the land."[34]

In her book *Abolition Democracy*, Angela Davis connects the persistence of the death penalty in the United States to this unfinished history of slavery and civil death. According to Davis, slavery became "a receptacle for all those forms of punishment that were considered to be barbaric by the developing [American] democracy. So rather than abolish the death penalty outright, it was offered refuge within slave law. . . . With the abolition of slavery this clearly racialized form of punishment becomes de-racialized and persists today under the guise of color-blind justice."[35]

But if this is the case, then in order to abolish the death penalty, one would have to abolish slavery once and for all, without exceptions. One would also have to abolish the system of racial valuation and devaluation that constructs whiteness as (invaluable) property and blackness as (market-valued) commodity. But how is this possible, when the fusion of race, personhood, and property is so deeply rooted in American history and reinforced by law?

In her 2003 book, *Are Prisons Obsolete?*, Davis presents an argument for prison abolition that begins to untangle this knot. Taking the Thirteenth Amendment as her starting point, Davis situates the current situation of mass incarceration and the hyper-incarceration of black people in a historical context of slavery, its partial abolition, the Black Codes that sprang up in the wake of slavery, the convict leasing system that functionally replaced it, and the continued existence of plantation prisons, some of which are literally built on former slave plantations.[36] Like Mumia Abu-Jamal, Davis understands the prison industrial complex as a criminal-legal response to the socioeconomic problem of "managing large populations—particularly people of color—who have been rendered dispensable by the system of global capitalism."[37] "The prison therefore functions ideologically as an abstract site into which undesirables are deposited, relieving us of the responsibility of thinking about the real issues afflicting those communities from which prisoners are drawn in such disproportionate numbers."[38]

The challenge of facing this responsibility for the ravages of racial capitalism in the prison industrial complex has been taken up not by death penalty abolitionists, most of whom advocate for life imprisonment without parole as a moral and fiscally responsible "alternative" to state execution, but rather by prison abolitionist movements grounded in intersectional feminism and radical critiques of racism, heteropatriarchy, and global capitalism.[39] For Angela Davis, prison abolition is both a critical movement to dismantle the oppressive structures that (re)produce mass incarceration and also a creative movement to build a constellation of strategies, institutions, structures, and practices that would make prisons obsolete. Drawing on Du Bois's notion of the "abolition democracy" that would be necessary to dismantle the institutions and practices of slavery, she calls for a movement of radical reconstruction to transform the intersecting forms of domination that prison slavery both presupposes and intensifies. This constellation of alternatives to prison includes restorative and transformative justice, as well as a meaningful investment in public education and free health care, including mental health care and respectful, effective forms of treatment for addiction.

I will have more to say about prison abolition movements in the final section of this essay, but first I would like to return to Derrida's Death Penalty Seminar to explore the possibilities for a Derridean engagement with the issues raised by Mumia Abu-Jamal, Cheryl Harris, and Angela Davis.

Property, Indemnity, and Interest: Derrida's Tenth Session

In *The Death Penalty*, Derrida critically interrogates the possibility of abolishing the death penalty on principle and without exceptions.[40] While "abolitionist discourse claims to be driven by a pure principle, by the concern with putting life above any other value, and human dignity above any market, any price," even ardent abolitionists like Victor Hugo seem to be motivated by a desire for moral purity and innocence that reveals an *interest* at the heart of a principled, "*disinterested* abolitionist discourse."[41] The psychic investment in one's own redemption, credibility, and propriety betrays an interest in ownership, credit, and property; and the desire for indemnity or "being-unscathed (that is, safe, sound, intact, virgin, unhurt, *heilig*, holy)" implies a certain disavowal of finitude and the relational structure of personhood.[42] In this sense, death penalty abolitionism may serve to reinforce the logic of whiteness as property rather than dismantling or deconstructing it. Derrida concludes the first volume of the seminar with

the sobering claim that "even when the death penalty will have been abolished . . . it will survive; there will still be some death penalty."[43] But it is not clear that the same critique applies to prison abolition movements or to a death penalty abolitionism grounded in a robust critique of racial capitalism and heteropatriarchy. In this section, I will explore the possibilities for developing Derrida's internal critique of death penalty abolitionism, without necessarily accepting his conclusion that there will always be some form of death penalty.

In the midst of his critique of abolitionist interest, Derrida makes a confession: "Yes, I am against the death penalty because I want to save my neck, to save the life I love, what I love to live, what I love living. And when I say 'I,' of course, I mean 'I,' me, but also the 'I,' the 'me,' whoever says 'I' in its place or in mine."[44] This last phrase is crucial: It opens the narrow self-interest in one's own life to the indeterminacy of the other in me, the "whoever" without whom I would not be able to say "I" but who is not located absolutely in one place or another. The "I" is understood here as a shifting indexical that can only express the singularity of a living, speaking subject by functioning as an anonymous pointer to anyone, anywhere—including the other who kills and the other who is killed. The indeterminacy of the "I" cannot be contained within the narrow confines of any proper place or claimed as the property of any particular person or group of people. To say "I" is always already to be contaminated by the indefinite trace of the other in me.

This suggests that, even when I insist upon my own narrow self-interest—either as a supporter of the death penalty who demands to be protected from murderous others or as a death penalty abolitionist who demands to be protected from the moral impurity of becoming an accomplice to state execution—the very act of saying "I" already exposes my narrow self-interest to the inter-est of being-between and being-with others. Derrida asks: "What is an interest? The word itself is interesting, where it implies in Latin both the fact of finding oneself or of being in the middle, between implicated in a space larger than oneself and, on the other hand, fiduciary calculation, surplus value, the search for a profit and a capitalization, in short, an economy—either monetary or psychological, the search for a greater well-being, for a greater good, one's own good or one's own well-being, an increase of enjoyment."[45]

In other words, interest is perpetually torn between the restricted economy of calculation and the general economy of ex-isting in a between-space that is not the proper-ty of oneself or the other but rather the spacing of a life shared in common (whether we like it or not), a sur-vival of the I

in the other and the other in the same. This "I that is not one" opens the identity of hegemonic whiteness to différance—namely, to the differing and deferral of an abolition-democracy-to-come, a democracy in which whiteness no longer remains sovereign. As the final section of this essay suggests, the deconstruction of whiteness as property cannot be undertaken in the name of European Enlightenment values such as "human dignity" but rather is always already taking place in the anonymity of movements for social justice that affirm the relational singularity of each and every life while contesting the diminished life chances of disposable populations.

Derrida claims that he is "not seeking to maintain a *disinterested* abolitionist discourse but to think otherwise the interest there could be in standing up against the death penalty and in universally abolishing the death penalty."[46] He argues that his own interest in "sav[ing] the life I love" is rooted in "an interest so originary, so primordial that it risks being shared, in truth, by the supporters of the death penalty."[47] Based on his reading of European arguments for and against the death penalty, Derrida argues that both positions are ultimately based on a desire to "protect life," which in turn implies a commitment to "the inviolability of human life as an *inalienable property*, as a right of property over one's own life, which is no less sacred than the inviolability of the domicile as right of property and thus the patrimonial right of the family."[48] For Victor Hugo, the right to life—understood as a property right and as a form of self-ownership—is so fundamental that, for him, "the first sign of civilization versus barbarity" is the abolition of the death penalty, which protects the citizen against the destruction of his life/property by the state and limits the power of the sovereign to kill or let live.[49] In Derrida's verbal commentary on his lecture notes, he adds that, for Hugo, "Life is what is proper to me, inviolable by definition. . . . Even if you kill me, you cannot violate the properness or property of my life. It is as if the abolitionists were people who basically dreamed of eternity, who dreamed of remaining eternally the proprietors of their lives."[50]

But what if one's life is legally the property of another? What if the very logic of kinship is altered by law to ensure that the children of enslaved women bear the mark of slavery, even if their father is a white man? What does "life" mean in a situation that condemns black slaves to civil death while indemnifying white slave owners from responsibility for the lives of their own (black) children? Furthermore, what if the sovereign power to kill or let live is invested not in an individual person or position but in the popular sovereignty of "the people" in a democratic republic that affirms

the right to "life, liberty, and the pursuit of happiness" but that is simultaneously founded on racial exclusion and the constitution of whiteness as property? What is the effect of a racialized sense of property, sovereignty, and life on the logic of the death penalty and on the stakes of death penalty abolitionism?

Not every life is legible as a form of inalienable property. Nor would an upgrade in the status of black lives from commodity to property-owner be sufficient to abolish the logic and structure of racial capitalism that is operative in both slavery and the prison industrial complex, albeit in different ways. An abolitionism worthy of the name would require the abolition of whiteness as property; but this does not necessarily mean the construction of blackness as a property of equal or greater power. Rather, it demands a deconstruction of the logic of calculable life, and the affirmation of a general economy of mattering, beyond the binary opposition of meaning and materiality. Far from excluding enslaved peoples from access to abolitionist discourse, the affirmation of a life that is illegible as one's own inalienable property holds open the possibility, beyond the European abolitionism of high ideals and property values, of a Black abolitionism based on a collective affirmation of life against civil death: the affirmation of an *improper* life of incalculable mattering.

Derrida argues that an abolitionism worthy of the name would be driven by an interest in "my life" not as my own exclusive property but as a life that "originarily passes by way of the heart of the other. . . . I can put the living before the dead only on the basis of the affirmation and preference of my life, of my living present, right there where it receives its life from the heart of the other."[51] He adds that "it belongs to life not necessarily to be immortal but to have a future, thus some life before it, some event to come only where death, the instant of death, is not calculable."[52] In this sense, the death penalty is not a violation of the timeless essence of human dignity but rather a denial of finitude and of the constitutive exposure of a human existent to the incalculable, indeterminate, yet absolutely unavoidable limit of death. The originary relation of my life to the heart of the other is, at least in part, a relation to the incalculable and therefore to the temporality of a future to-come. "I protect my heart, I protest in the name of my heart when I fight [*en me battant*] so that the heart of the other will continue to beat [*battre*]—in me before me, after me, or even without me."[53] This is what it means to fight the death penalty: not on the basis of a desire for one's own moral purity but on the basis of a constitutive intercorporeality and the temporal chiasmus that this implies. Derrida continues: "It is my own interest, the interest of my life, of the heart of the other

in me, that makes me responsible both for the other and before the other who is in front of me before me. . . . In other words, I am *invested*; invested as one is by a force greater than oneself and that occupies you entirely by pre-occupying you, and invested as one is by a responsibility."[54]

Whether or not I can identify emotionally with a prisoner on death row, or apply a universal principle of human dignity to them, their life and death *matters* ethically, simply by virtue of the relational structure of creaturely life. Since my own life always already passes through the heart of the other, the death penalty "machine" betrays the finitude of those who are condemned to death; and, as Derrida argues, this machine even "deprives me of my own finitude."[55] Even hyper-valued and hyper-protected lives are not, for this very reason, free; to the extent that the indeterminacy of finitude is rejected or disavowed, even those whose lives are marked as precious and worthy of capital investment are caught up in a machinery of biopolitical calculation, one side of which is the waste disposal mechanism of the death penalty, while the other side is the safety deposit box of the gated community, securitized workplace, safe campus, or other privileged and protected spaces.

Derrida claims that the irresolvable tension between a "mad" desire for immortality and the affirmation of an alterity at the heart of my own identity condemns us to a "phantasmatic truth that will probably remain forever invincible, thus guaranteeing forever, alas, a double survival, both the survival of the death penalty and the survival of the abolitionist protest."[56] But what are the philosophical grounds for this claim? The desire for infinite survival posits a kind of "life drive" that may or may not be discernible in every living being, and that—at the very least—is complicated by the death drive. But the affirmation of alterity at the heart of identity is constitutive of the very meaning of identity; one literally cannot say "I" without exposing oneself to the indeterminacy of the anyone. One can imagine a world in which people do not share a mad and perverse desire for immortality; but one cannot imagine a world in which the word "I" (or the grammatical position of the first-person singular) signifies without opening itself to an indefinite plurality of possible iterations.

Derrida argues that the "impossible task of this seminar is this: to break this alliance, this symmetry between abolitionism and anti-abolitionism where finally each of them needs the other."[57] The conclusion of this first volume seems to suggest that this is indeed an impossible task; even if state execution were abolished in every nation on earth, some form of the death penalty would still persist, if only as the disavowal of finitude in oneself and others. But what if this (impossible, yet necessary) task were already

embodied in the praxis of twenty-first-century prison abolition movements, insofar as they desist from the interest in purity, protection, and indemnity that frames the symmetry between death penalty abolitionism and antiabolitionism? What if American discourses and practices of prison abolitionism resisted both the logic of whiteness as property at the foundation of U.S. democracy and also the colorblind racism at the foundation of the European Enlightenment and even in the work of its most powerful critics? That would truly be an abolitionism worthy of the name.

An Abolitionism Worthy of the Name

> Many people have already reached the conclusion that the death penalty is an outmoded form of punishment that violates basic principles of human rights. It is time, I believe, to encourage similar conversations about the prison.
>
> ANGELA DAVIS, *Are Prisons Obsolete?*

Throughout his work, Mumia Abu-Jamal traces the economic and political interests that drive mass incarceration and the hyper-incarceration of poor people of color; but he also develops an account of relational personhood that resonates with Derrida's account of a life that always already passes through the heart of the other. In *Live from Death Row*, Mumia writes, "Despite the legal illusions erected by the system to divide and separate life, we the caged share air, water, and hope with you, the not-yet-caged. We share your same breath. As John Africa [of MOVE] teaches, 'All life is connected.'"[58] Mumia draws inspiration from the African concept of Ubuntu, which is translated by Huey Newton as "I am we," and by Desmond Tutu as "a person is a person through other persons."[59] "For who are people, but for their relations and relationships?"[60]

UBUNTU is also the name of a grassroots activist group based in Durham, North Carolina. In her essay for the Critical Resistance volume *Abolition Now!*, Alexis Pauline Gumbs explains the core insight of UBUNTU:

> Acknowledging that "I Am Because We Are" or that all of our actions impact each other is fundamental to creating accountability. When we take a stance that says that we will go for the root cause and not criminalize each other for harmful actions that are already linked to wider structures of harm and processes of growth and learning, we can free each other to take responsibility for harmful actions that occur in our communities instead of trying to fabricate an impossible

> innocence. I am because we are. This means we are all necessary to each other and we are all involved in each other's actions for worse and also for better.[61]

For Gumbs, abolition is not a moral project based on abstract principles such as human dignity or the sanctity of individual life, nor is it an attempt to indemnify oneself as an innocent, unscathed, and unhurt subject. Rather, abolition is an everyday praxis of affirming and deepening the constitutive relationality of self and other and cultivating a meaningful sense of responsibility for others both in one's intimate relationships and in response to broader structures of social injustice. Gumbs asks: "What if abolition isn't a shattering thing, not a crashing thing, not a wrecking ball event? What if abolition is something that sprouts out of the wet places in our eyes, the broken places in our skin, the waiting places in our palms, the tremble holding in my mouth when I turn to you? What if abolition is something that grows? What if abolishing the prison industrial complex is the fruit of our diligent gardening, building and deepening of a movement to respond to the violence of the state and the violence in our communities with sustainable, transformative love?"[62]

For Gumbs, abolition is an embodied praxis that takes time to unfold, and that may never be completed, but that takes root in complex histories of violence and resistance. She enjoins readers to reflect on the place where they stand—on ground that is "thick with screams, hard with the caked silences of those who resigned themselves to pain," ground for the "sacrifice of bodies to capital"—but also ground that is "ready with queer potentials," "as full of alternative histories and forgotten resistance as our skin cells."[63] In order to (re)claim this queer potential and (re)open a meaningful sense of the future, we must acknowledge that "*we are all capable of harming each other even when we don't mean to. This means the difficult remembering that if most perpetrators of gendered violence have survived violence themselves, those of us who identify as survivors have often been perpetrators in a number of ways.*"[64]

Rather than idealizing prisoners as "victims" and abolitionists as innocent, unscathed moral crusaders, Gumbs affirms both the complexity of ethical life, in which the ordeal of passing through each other's hearts makes us vulnerable to harming and being harmed, and also the indefinite potential of a future that (re)opens through an affirmation of relational finitude in a particular place and time.

Neither disavowing their interest in abolition nor restricting this interest to a narrow investment in purity and propriety, prison abolition

movements affirm the messy complexity of violence and vulnerability, reform and revolution. As the anonymous author of a 1971 article in *Off Our Backs* writes: "To abolish prisons we may have to develop 'reforms' that carry within them contradictions that will make it hard to achieve them without drastically changing prisons. . . . And [yet] we can't wait for the ending of racism, sexism and poverty in this country before we begin tearing down the walls. It may be in our own self interest."[65]

The split temporality of present-day reforms for the sake of a future that will have been necessary to accomplish these reforms in the first place is also articulated by Eric Stanley in his introduction to *Captive Genders*: "The time of abolition is both yet to come and already here. In other words, while we hold on to abolition as a politics for doing anti-PIC work, we also acknowledge there are countless ways that abolition has been and continues to be here now. As a project dedicated to radical deconstruction, abolition must also include at its center a reworking of gender and sexuality that displaces both heterosexuality and gender normativity as measures of worth."[66]

In the same volume, Morgan Bassichis, Alexander Lee, and Dean Spade, in "Building an Abolitionist Trans & Queer Movement with Everything We've Got," affirm the (im)possibility of this project:

> Being impossible may just be the best thing we've got going for ourselves:
>
> *Impossibility may very well be our only possibility.*
>
> What would it mean to *embrace*, rather than *shy away from*, the impossibility of our ways of living as well as our political visions? What would it mean to desire a future that we can't even imagine but that we are told couldn't ever exist? We see the abolition of policing, prisons, jails, and detention not strictly as a narrow answer to "imprisonment" and the abuses that occur within prisons, but also as a challenge to the rule of poverty, violence, racism, alienation, and disconnection that we face every day. . . . Abolition is not some distant future but something we create in every moment when we say no to the traps of empire and yes to the nourishing possibilities dreamed of and practiced by our ancestors and friends.[67]

In the words of Dylan Rodriguez, prison abolition is "a pedagogical approach that asks the unaskable, posits the necessity of the impossible, and embraces the creative danger inherent in liberationist futures."[68]

The theory and practice of prison abolition offers a vital supplement to Derrida's deconstruction of the death penalty, both addressing gaps in Derrida's own account of the death penalty and also moving his analysis of relational life in an unforeseen direction. Even if a pure and principled abolition of the death penalty remains unthinkable, perhaps the messy, impure, and (im)possible praxis of prison abolition holds open the promise of an abolitionism worthy of the name.

NOTES

1. Jacques Derrida, *The Death Penalty*, vol. 1, trans. Peggy Kamuf (Chicago: University of Chicago Press, 2014), 79n16.

2. Ibid., 41.

3. Ibid., 73.

4. David M. Oshinsky, *Worse than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice* (New York: The Free Press, 1997). See also "13th Amendment to the U.S. Constitution," Library of Congress, https://www.loc.gov/rr/program/bib/ourdocs/13thamendment.html, accessed December 28, 2016.

5. Derrida, *Death Penalty*, 1:33.

6. Ibid., 76–77, 138, 77–79.

7. On Thomas Miller-El, see http://www.thomasmillerel.org/ and http://www.deathpenaltyinfo.org/node/2332. On Mumia Abu-Jamal, see http://www.freemumia.com/who-is-mumia-abu-jamal/ and http://www.emajonline.com/. See also Sarah Tyson's essay in this volume for a discussion of the importance of abolishing the social death penalty, beyond state execution.

8. Derrida, *Death Penalty*, 1:138.

9. Ibid., 77.

10. See Jacques Derrida, "For Mumia Abu-Jamal," in *Negotiations: Interventions and Interviews, 1971–2001*, ed. Elizabeth Rottenberg (Stanford, Calif.: Stanford University Press, 2002), 125–29.

11. Derrida, *Death Penalty*, 1:74–75.

12. Ibid., 75. McCleskey v. Kemp 481 U.S. 279 (1987).

13. Ibid., 178.

14. Derrida, "For Mumia Abu-Jamal," 125.

15. Ibid., 126.

16. Qtd. in Derrida, "For Mumia Abu-Jamal," 129, source unknown.

17. Dred Scott v. Sandford 19 U.S. (How.) 393, 407, 15 L.Ed. 691 (1857).

18. Mumia Abu-Jamal, *Live from Death Row* (Reading, Mass.: Addison-Wesley, 1995), 38–39.

19. United States Declaration of Independence, 1776.
20. Dred Scott v. Sandford 60 U.S. 393.
21. Ibid.
22. McCleskey v. Kemp 481 U.S. 279.
23. Derrida, *Death Penalty*, 1:1; Abu-Jamal, *Live from Death Row*, 38–39.
24. Abu-Jamal, *Live from Death Row*, 89.
25. Ibid., 95. Cf. Derrida, *Death Penalty*, vol. 1.
26. Abu-Jamal, *Live from Death Row*, 95.
27. Mumia Abu-Jamal and Marc Lamont Hill, *The Classroom and the Cell: Conversations on Black Life in America* (Chicago: Third World Press, 2014), 28.
28. See also George Lipsitz, *The Possessive Investment in Whiteness: How White People Profit from Identity Politics* (Philadelphia, Penn.: Temple University Press, 1998); David Roediger, *The Wages of Whiteness: Race and the Making of the American Working Class* (New York: Verso, 1991); and Joel Olson, *The Abolition of White Democracy* (Minneapolis: University of Minnesota Press, 2004).
29. Cheryl I. Harris, "Whiteness as Property," *Harvard Law Review* 106, no. 8 (1993): 1714.
30. Ibid., 1759.
31. Ibid., 1720.
32. Ibid.
33. Qtd. in Harris, "Whiteness as Property," 1719.
34. Qtd. in Colin Dayan, *The Law Is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton, N.J.: Princeton University Press), 61. See also Dennis Childs, *Slaves of the State: Black Incarceration from the Chain Gang to the Penitentiary* (Minneapolis: University of Minnesota Press, 2015).
35. Angela Y. Davis, *Abolition Democracy: Beyond Empire, Prisons and Torture* (New York: Seven Stories Press, 2005), 33–34. See also Angela Y. Davis, *Are Prisons Obsolete?* (New York: Seven Stories Press, 2003), 10, 106.
36. Davis, *Are Prisons Obsolete?*, 22–39.
37. Davis, *Abolition Democracy*, 43.
38. Davis, *Are Prisons Obsolete?*, 16.
39. For a critique of the neoliberal death penalty abolition movement, see Andrew Dilts, "Death Penalty 'Abolition' in Neoliberal Times: The SAFE California Act and the Nexus of Savings and Security," in *Death and Other Penalties: Philosophy in a Time of Mass Incarceration*, ed. Geoffrey Adelsberg, Lisa Guenther, and Scott Zeman (New York: Fordham University Press, 2015).
40. See also Jacques Derrida, *For What Tomorrow . . . : A Dialogue*, interview with Elizabeth Roudinesco, trans. Jeff Fort (Stanford, Calif: Stanford University Press, 2004), 146, 148.
41. Derrida, *Death Penalty*, 1:141, 1:254.
42. Ibid., 254.

43. Ibid., 282.
44. Ibid., 255.
45. Ibid., 140.
46. Ibid., 254.
47. Ibid., 255.
48. Ibid., 255, 120.
49. Ibid., 120.
50. Ibid., 130.
51. Ibid., 255.
52. Ibid., 256.
53. Ibid., 257.
54. Ibid.
55. Ibid.
56. Ibid., 258.
57. Ibid., 259.
58. Abu-Jamal, *Live from Death Row*, 62.
59. Huey Newton, *Revolutionary Suicide*, qtd. in Abu-Jamal, *Live from Death Row*, xi; Desmond Tutu, *No Future without Forgiveness* (New York: Doubleday, 1999), 31.
60. Abu-Jamal, *Live from Death Row*, 12.
61. Alexis Pauline Gumbs, "Freedom Seeds: Growing Abolition in Durham, North Carolina," in *Abolition Now! Ten Years of Strategy and Struggle against the Prison Industrial Complex* (Oakland, Calif.: AK Press, 2008), 152–53.
62. Ibid., 145.
63. Ibid., 147–48.
64. Ibid., 152, emphasis in original. See also Morgan Bassichis, Alexander Lee, and Dean Spade, "Building an Abolitionist Trans & Queer Movement with Everything We've Got," in *Captive Genders: Trans Embodiment and the Prison Industrial Complex*, ed. Eric A. Stanley and Nat Smith (Oakland, Calif.: AK Press, 2015).
65. Anonymous, "How Many Lives?," *Off Our Backs* 2, no. 1 (1971). See also Angela Davis and Dylan Rodriguez, "The Challenge of Prison Abolition: A Conversation," *Social Justice* 27, no. 3 (2000).
66. Eric A. Stanley, "Fugitive Flesh: Gender Self-Determination, Queer Abolition, and Trans Resistance," in *Captive Genders: Trans Embodiment and the Prison Industrial Complex*, ed. Eric A. Stanley and Nat Smith (Oakland, Calif.: AK Press, 2015), 8.
67. Bassichis, Lee, and Spade, "Building an Abolitionist Trans & Queer Movement," 36.
68. Dylan Rodríguez, "The Disorientation of the Teaching Act: Abolition as Pedagogical Position," *Radical Teacher* 88 (Summer 2010): 12.

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